TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[illegible]3

No. [illegible] 62

NATHAN JACKSON, PETITIONER

vs.

WILFRED DENNO, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 30, 1962
CERTIORARI GRANTED JANUARY 21, 1963

Supreme Court of the United States

OCTOBER TERM, 1962

No. 764

NATHAN JACKSON, PETITIONER

vs.

WILFRED DENNO, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

[fol. A]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

27662

UNITED STATES OF AMERICA, ex rel. NATHAN JACKSON,
REALTOR-APPELLANT

- against -

WILFRED L. DENNO, As Warden of Sing Sing State Prison, Ossining, New York, RESPONDENT-APPELLEE

APPENDIX TO APPELLANT'S BRIEF—
filed July 26, 1962

* * * *

[File Endorsement Omitted]

[fol. 1] * * *

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

SUMMARY OF DOCKET ENTRIES

On March 19, 1962, on the basis of a verified petition, Judge John M. Cashin in the United States District Court for the Southern District of New York, granted Nathan Jackson an order staying his execution and requiring respondent Warden Wilfred Denno to show cause why a writ of habeas corpus should not issue. Oral argument on that show cause order took place on April 9, 1962, before Judge Archie O. Dawson. On May 22, 1962 Judge Dawson denied the petition and vacated the stay of execution. On June 14, 1962, Judge Dawson certified that there was probable cause for an appeal from his order of May 22, 1962 and he ordered that Nathan Jackson be permitted to prosecute such appeal in *forma pauperis*. Notice of said appeal was filed on June 20, 1962.

[fol. 3]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

OPINION—May 22, 1962

"DAWSON, D.J.:

This is an application for a writ of habeas corpus initiated by an order to show cause. The petition urges that petitioner's constitutional rights were violated and that conviction must be set aside for three reasons: (1) his confession was involuntary, (2) the court's instructions to the jury on the question of voluntariness were inadequate, erroneous and prejudicial, and (3) the New York procedure for determining the voluntariness of confessions is violative of due process as a matter of law.

Petitioner was jointly indicted with one Nora Elliott by a grand jury of Kings County for murder in the first degree in the shooting and killing of William J. Ramos, Jr., a police officer, following the commission of the felony of robbery. Petitioner was convicted of murder in the first degree and sentenced to death. Elliott was convicted of manslaughter in the first degree and sentenced to a term in prison. Elliott did not appeal from the judgment of conviction. On appeal to the New York Court of Appeals on behalf of petitioner the judgment was affirmed (10 N.Y.2d 780). A motion for reargument or for amendment of the remittitur so as to certify a federal constitutional question was denied by the New York Court of Appeals on October 5, 1961 as to reargument but was granted as to amendment of the remittitur and the constitutional question was certified that the Court of Appeals had necessarily passed upon the voluntariness of certain con- [fol. 4] fessions and had found that defendant's constitutional rights had not been violated. Application was made to the United States Supreme Court for a writ of certiorari which was denied on December 18, 1961. On February 22, 1962 the Court of Appeals denied a further motion for reargument and for a stay of execution pending the filing of a new petition for certiorari. An application to Mr. Justice Harlan of the United States

Supreme Court for a similar stay was denied by him on March 7, 1962. The instant petition for issuance of a writ of habeas corpus then followed. It would seem that petitioner has exhausted all remedies available to him.

The Court, in compliance with the opinion of the United States Supreme Court in *Brown* v. *Allen*, 344 U.S. 443 (1952), has examined the transcript of the state proceedings to determine whether the state processes had given full consideration to the issues and had resulted in a satisfactory conclusion. Where the record affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and such consideration is given to the entire state record, there is no necessity for having a hearing on the application for a writ of habeas corpus. See 344 U.S. at p. 463. The Court has examined the entire record of the proceedings in the state court, consisting of 823 pages of printed transcript.

It appears from the transcript that petitioner Jackson entered a Brookyln hotel accompanied by Nora Elliott at about 1:00 A.M. on June 14, 1960. They registered at the hotel. As the clerk was about to show them a room, Jackson at the point of a gun robbed the clerk. He told [fol. 5] Elliott to leave the hotel, which she did. The petitioner forced the clerk and several other people to an upstairs room and warned them to make no outcry after his departure. They, however, broke a window and began to shout. The police officer Ramos, hearing the alarm, intercepted Jackson as he was escaping from the hotel. Ramos endeavored to arrest Jackson. A fight ensued in the course of which Jackson shot Ramos twice, inflicting fatal wounds. Ramos, in turn, shot Jackson who was wounded but not killed. Jackson attempted to flee but was captured and taken to a hospital. While at the hospital he was interviewed by a detective. He said to the detective: "I shot the colored cop. I got the drop on him." (R. 1272). This statement was made about 2:00 A.M. in the hospital. At about 3:55 A.M., in the hospital, Jackson was questioned by representatives of the District Attorney. There he made a statement which was taken down by a reporter of the District Attorney's office. The statement was transcribed and offered in evidence at the trial. When it

was offered in evidence the court asked Jackson's attorney whether he had any objection to it. Jackson's attorney stated that he had no objection. (R. 1381).

Jackson took the stand in his own behalf. He admitted commission of the robbery and the fact of the shooting of Ramos. He contended, however, that the robbery was all over at the time he left the hotel and the shooting was not in connection with the robbery. He tried to excuse the shooting by the assertion of intoxication. The jury rendered a verdict of guilty of murder in the first [fol. 6] degree against Jackson, indicating that it rejected his defense.

The petition for a writ of habeas corpus raises merely questions relating to the voluntariness of the confession. It is hard to tell from the moving papers and the briefs submitted in support of the petition what confession petitioner is referring to. There was one confession made by Jackson at 2 o'clock in the morning when he stated to Detective Kaile as follows: "I shot the colored cop. I got the drop on him." No objection was made to the introduction of this testimony. There was the other more detailed confession which was taken down in transcription by a stenographer of the District Attorney's office and which was introduced in evidence without objection by Jackson's attorney. This was taken at about 3:55 A.M. at the hospital. The important part of this confession was the following:

"Q. How many shots did you fire at the officer?
A. I don't know.
Q. Was it more than one?
A. Yeah.
Q. Who fired first, you or the police officer?
A. I beat him to it.
Q. How many times did you fire at him?
A. I don't know; twice probably."

It is the contention of the petitioner that the confession was involuntary. It is urged that Jackson, at the time he made the statement to the representatives of the District Attorney's office, was suffering from loss of blood,

[fol. 7] thirst, severe pain of bullet wounds and the effects of certain drugs which had been administered to him to relieve the pain from which he was suffering.

The issue of the voluntariness of the confession was submitted to the jury by the trial court. There was certainly no clear indication that the confession was involuntary. The Court reaches this conclusion not merely upon the conclusion reached by the state courts of New York but by appropriate examination of the entire record of the trial. See *Jennings* v. *Ragen*, 358 U.S. 276, 277 (1959).

Although defendant's counsel made no objection to the admission of the confession at the time it was offered in evidence, the trial court nevertheless carefully instructed the jury as follows:

> "I shall now give you the applicable law concerning such statement which the District Attorney claims is a confession on the part of Jackson, or an admission of Jackson.
>
> "Jackson testified he was shot. He was under a sedative. He said he was refused water unless he answered the questions as they wanted him to answer them. He said he remembers some questions and answers, and denied others. He had no recollection as to some questions and answers. He said that the statement which the District Attorney claims to be a confession was obtained from him in violation of law. You have heard all the testimony on that point, as well as on every other point. Now let me give you the law.
>
> "A confession of a defendant, says the law, whether in the course of a judicial proceeding, or to a private [fol. 8] person, can be given in evidence against him unless made under influence of fear, produced by threats, or unless made on a stipulation of the District Attorney that he shall not be prosecuted therefor. Of course, in this case, there is no claim that the District Attorney made any such stipulation, so do not be concerned with that part of it.

"Under our law, a confession is not sufficient to warrant a conviction without additional proof that the crime charged has been committed. . . .

* * * * *

"Under our law, a confession, even if true and accurate, if involuntary, is not admissible, and if it is left for the jury to determine whether or not it was voluntary, its decision is final. If you say it was involuntarily obtained, it goes out of the case. If you say it was voluntarily made, the weight of it is for you. So I am submitting to you as a question of fact to determine whether or not (a) this statement was made by Jackson, or allegedly made by Jackson, whether it was a voluntary confession, and whether it was true and accurate. That decision is yours.

"Should you decide under the rules that I gave you that it is voluntary, true and accurate, you may use it, and give it the weight you feel that you should give it. If you should decide that it is involuntary, exclude it from the case. Do not consider it at all. In that event, you must go to the other evidence in the case to see whether or not the guilt of Jackson was established to your satisfaction outside of the confession, beyond a reasonable doubt.

* * * * *

"I repeat to you again, the burden of proving the accuracy, truth, and the voluntariness of the confession always rests upon the prosecution." (R. 2248-2255)

[fol. 9] Whether the confession was voluntarily made was one of the issues submitted to the jury. It was an issue argued by Jackson's counsel in his summation as follows:

"He tells you what happened when he got down there to the hospital. Well, he told them he was hurt. He was gasping for breath, he says, breathing becoming difficult and couldn't talk very long. He says he doesn't remember talking to any detectives or anybody. Well, maybe he does and maybe he doesn't. I don't know, gentlemen. That's your responsibility."

We have, therefore, in summary, the following situation:

After the defendant was arrested, and while in the hospital, he made certain statements to police officers or a representative of the District Attorney's office. There is no clear and conclusive proof that these statements were extorted from him, or that they were given involuntarily. When evidence was introduced at his trial of the statements made by the defendant no objection to the introduction of such evidence was made by his attorney, who was an experienced trial lawyer and a former judge. No request was made by counsel for the defendant for a preliminary hearing on the issue as to whether the statements were voluntary. Nevertheless the trial court, with proper instructions, submitted this issue to the jury. The jury convicted the defendant. There was evidence, in addition to the statements of the defendant, from which the jury could have concluded that the defendant was guilty.

Under those circumstances have the petitioner's constitutional rights been violated? As the United States Supreme Court said in *Lyons* v. *Oklahoma*, 322 U.S. 596 (1942):

[fol. 10] "Review here deals with circumstances which require examination into the possibilities as to whether the judge and jury in the trial court could reasonably conclude that the McAlester confession was voluntary. The fact that there is evidence which would justify a contrary conclusion is immaterial. To triers of fact is left the determination of the truth or error of the testimony of prisoner and official alike. . . ." 322 U.S. 596, at p. 603.

The New York procedure for determining whether the incriminating statements were voluntary is described in the opinion of the United States Supreme Court in *Stein* v. *New York*, 346 U.S. 156 (1953) at page 172, in the following language:

"The procedure adopted by New York for excluding coerced confessions relies heavily on the jury. It requires a preliminary hearing as to admissibility, but

does not permit the judge to make a final determination that a confession is admissible. He may—indeed, must—exclude any confession if he is convinced that it was *not* freely made or that a verdict that it was so made would be against the weight of evidence. But, while he may thus cast the die against the prosecution, he cannot do so against the accused. If the voluntariness issue presents a fair question of fact, he must receive the confession and leave to the jury, under proper instructions, the ultimate determination of its voluntary character and also its truthfulness. *People* v. *Weiner*, 248 N.Y. 118, 161 N.E. 441. The judge is not required to exclude the jury while he hears evidence as to voluntariness, *People* v. *Brasch*, 193 N.Y. 46, 85 N.E. 809, and perhaps is not permitted to do so, *People* v. *Randazzio*, 194 N.Y. 147, 159, 87 N.E. 112, 117."

In the present case no request was made by defense counsel for a preliminary hearing. If one had been made [fol. 11] it would undoubtedly have been granted by the trial court, in accordance with the New York rule. Defendant, however, apparently preferred to proceed on the basis of letting everything go before the jury. A similar situation existed in *United States* v. *Richmond*, 295 F.2d 83 (2d Cir. 1961), in which defense counsel made no objection to a confession being introduced in evidence. The court said:

". . . Having made no objection, Reid should not now be heard to raise constitutional objections which he did not see fit to urge at the earlier stage . . . .

"Every defendant must, of course, be accorded a fair trial. But the state is also entitled to a fair trial. When, after an extended hearing, informed and experienced defense counsel has taken a position, and the state, in reliance on it, has tried its case accordingly, it would be unduly tipping the scales of justice against the state to permit a defendant to argue that his conviction must be vacated because his counsel should not have taken the position he did and

should not have made the concessions on which the state acted. . . ."

The issue as to whether the incriminating statements were voluntary was submitted to the jury under proper instructions. Petitioner's argument here essentially is that the conclusions of the New York judge and jury were mistaken and that by reviewing the evidence this Court should, as a super-jury, find that the confession was coerced. This is not the function of a federal court. *Stein* v. *New York*, 346 U.S. 156, 180 (1953).

The Court concludes there is no good reason to find that the confession of the defendant was involuntary, or that [fol. 12] the court's instructions to the jury on the question of voluntariness were inadequate, erroneous or prejudicial, or that the New York procedure for determining the voluntariness of confessions is violative of due process as a matter of law.

The petition for a writ of habeas corpus is denied and the stay vacated.

Dated: New York, N.Y.
May 22, 1962.

/s/ Archie O. Dawson
U. S. D. J.

[fol. 13]

IN THE COUNTY COURT OF KINGS COUNTY, NEW YORK

TRIAL TERM—PART IV

THE PEOPLE OF THE STATE OF NEW YORK

- against -

NATHAN JACKSON, NORA ELLIOT DEFENDANTS

EXCERPTS OF TRANSCRIPT OF TESTIMONY

CONFESSION OF NATHAN JACKSON

Mr. Schor: Statement No. 1056; Folio Number 86; statement taken at the Cumberland Hospital, Brooklyn, N.Y. on June 14, 1960; commencing at about 3:55 A.M. By Assistant District Attorney Saul Postal; Vito Lentini, Hearing Reporter:

Nathan Jackson questioned by Mr. Postal:

"Q. What is your name? A. Nathan Jackson.
"Q. Where do you live? A. 446 Classon Avenue.
"Q. How old are you? A. I will be 25.
"Q. This morning did you go to the I. C. U. Hotel at 1124 Fulton Street? A. No.
"Q. Didn't you go there with a young lady named Nora something? A. This morning I didn't—yeah.
"Q. Why did you go there for, Nathan? A. To get a room.
"Q. Did you also go there to do a stick-up? A. No.
"Q. After you got there, did you decide to stick up the hotel? A. Yeah, when the woman recognized me.
"Q. What is the name of the girl that went to the hotel with you? A. Nora.
"Q. Did she know you were going to do a stickup? A. No.
[fol. 14] "Q. Did you have a gun with you? A. Yes.
"Q. What kind of a gun was it? A. .22; nine shot.
"Q. Did you speak to the woman Clerk? A. Yes.

"Q. Did you decide after she recognized you that you were going to rob her? A. Yes.

"Q. What did you say to her? A. I told her, 'It is a stickup.'

"Q. What did you do with the gun? A. I put it in my pocket.

"Q. Did you point the gun at her? A. Yeah.

"Q. Did you ask her for the money? A. Yeah.

"Q. How much money did she give you? A. I don't know.

"Q. Where did she take it from? A. Out of her pocket.

"Q. Where was Nora while this was going on? A. She had run out.

"Q. You told her to go out? A. Run out.

"Q. After you got the money from this woman— A. Look, I can't go on.

"Q. After you got the money from this woman did you tell everybody to go upstairs? A. Yeah.

"Q. Where did you tell them to stay? A. In the room.

[fol. 15] "Q. Did you lock the door? A. I didn't see them lock it.

"Q. Did you then go downstairs and see Nora? A. Yes, she came back there.

"Q. She came back upstairs to where you were? A. Not back up. She came out.

"Q. When you got to the lobby, did you and Nora start to go out of the door? A. No.

"Q. What did you do? Did you get out of the door before the officer came in? A. Yeah.

"Q. Where did you meet the officer? A. On the street.

"Q. What happened when you met him? A. I said, 'There was a fight upstairs.'

"Q. Then what? A. He insisted I go with him so I got the best of him.

"Q. How did you get the best of him? A. I know Judo.

"Q. You threw him over? A. Yeah.

"Q. Where was your gun while you were giving him the Judo? A. In my holster.

"Q. After you threw him to the ground, did you pull your gun? Where was the holster? A. On my shoulder.

"Q. After you threw him to the ground, what did you do about your gun? A. He went for his gun.

[fol. 16] "Q. What did you do? A. I got mine out first.

"Q. Did you point the gun at him. A. Yeah.

"Q. What did you say to him? A. Told him not to be a hero.

"Q. Where was Nora at this time? A. Right there then.

"Q. After you flung the cop to the ground, did he drop his club? A. I don't know.

"Q. Do you remember Nora picking up his club and hitting him with it? A. No.

"Q. Was she nearby while this was going on? A. She was screaming; that is all.

"Q. How many shots did you fire at the officer? A. I don't know.

"Q. Was it more than one? A. Yeah.

"Q. Who fired first, you or the police officer? A. I beat him to it.

"Q. How many times did you fire at him? A. I don't know; twice probably.

"Q. Did he go down? Did he fall down? A. Yeah.

Q. What did you do? A. I shot. I didn't know. I knew I was shot. While I was on the ground he fired the gun.

"Q. After the shots were fired, what did you do? A. I got in the cab.

"Q. Where did you go? A. I told the cabbie to bring me here."

[fol. 17] * * * *

TESTIMONY OF NATHAN JACKSON

Q. Were you asked this question and did you make this answer: "Who fired first, you or the police officer? A. I beat him to it." A. If I made any such answer as that, it is untrue. I don't recall having said that.

* * * *

TESTIMONY OF DR. GEORGE SUAREZ

DR. GEORGE SUAREZ, residing at Cumberland Hospital, Brooklyn, New York, called as a witness in rebuttal on behalf of the People, being first duly sworn by the Clerk of the Court (Mr. Reich), was examined and testified as follows:

Direct Examination by Mr. Schor:

Q. Dr. Suarez, are you a physician duly licensed to practice medicine in the Philippine Islands? A. Yes, sir.

Q. And are you now an Assistant Resident Physician at Cumberland Hospital under the Visitors Exchange Program between the United States and the Philippines? A. Yes, sir.

Q. Were you working at the hospital on June 14, 1960? A. Yes, sir.

Q. Do you recall a patient being brought to Ward 46, a patient whose name was Nathan Jackson, and he was being treated for a gunshot wound in the abdomen? [fol. 18] A. Yes, sir.

Q. Did you prescribe certain medication for him while you were there? A. Yes, sir.

Q. Now, did you at any time tell Jackson that if he wanted some water he must answer the questions that were being put to him by some men that were around him at the bedside? A. No, sir.

Q. Did you hear anybody—

The Court: In your presence did you hear anyone else say that to Mr. Jackson?

The Witness: No, sir.

The Court: Would you please establish the time, Mr. Schor, of when he saw the defendant Jackson?

By Mr. Schor:

Q. Doctor, can you tell us now without looking at the record about what time you first saw the patient, or would you rather look at the record to refresh your recollection? A. Well, I had better look at the record.

Q. All right. I show you these papers and ask you whether this is the hospital record of Cumberland Hospital. Are they, sir? A. Yes, sir.

Q. You may look at them.

The Court: Does that chart show when you first saw him, Doctor?

The Witness: Not the exact time is stated.

[fol. 19] The Court: What?

The Witness: The exact time is not stated.

The Court: From your recollection, do you know about when you saw him first and in what part of the hospital?

The Witness: Well, usually—

The Court: Not "usually." We want to get this case.

The Witness: When a case like this comes into the hospital, we are called immediately and we come down immediately.

The Court: Were you the first physician who saw him?

The Witness: Yes, sir.

The Court: Is that the best answer you can give?

The Witness: That's the best answer.

The Court: Can you give us the time of the operation, if any?

The Witness: Well, the operation should be here.

The Court: See if you can—

The Witness: We have the time of the operation, [fol. 20] starting from 5:00 a.m. and lasting up to 8:15 a.m.

The Court: All right. Proceed.

By Mr. Schor:

Q. Did you ever tell Jackson that if he wanted to be left alone, he had to give answers to the questions that were being put to him by these men? A. No, sir.

Q. You never said that to him? A. No.

The Court: In your presence did you hear anybody say that to him?

The Witness: No, sir.

Mr. Schor: You may inquire.

Cross Examination by Mr. Healy:

Q. Doctor, could I see that report, please? A. Yes, sir (handing same to Mr. Healy).

Q. Doctor, you stated that Mr. Jackson, the defendant here, was treated for gunshot wounds and medication was prescribed; is that right? A. Yes, sir.

The Court: A little louder, please, Doctor.

The Witness: Yes, sir.

By Mr. Healy:

Q. A little louder, Doctor, will you. Can you tell us what medication was prescribed, Doctor? A. We prescribed demerol.

Q. What is that? A. Demerol.

Q. Yes. A. And I think atropine.

[fol. 21] Q. Well, you say he was operated on, Doctor; is that right? A. Yes, sir.

Q. I am reading from here and I assure you that I am reading this correctly. Would you say that the operation showed a laceration of the liver and a hemorrhage of the right lung? Would that be correct? This is signed by Dr. Mendelson. Is he one of your associates there? A. Oh, Dr. Mendelson is the X-ray doctor.

Q. Well, will you look at that (handing same to the witness)? A. Yes, sir.

Q. Now, can you tell of your own independent recollection, or would you have to look at this report to tell me whether or not he was anesthetized? Was he given ether for the operation? A. I beg your pardon?

Q. Was he—

The Court: Was he given ether for the operation?

By Mr. Healy:

Q. Does the record show that? A. I couldn't remember, because the anesthetist takes care of that. The one who administers anesthesia takes care of that.

The Court: You can't operate in a case like this without giving him anesthesia?

The Witness: We operate with anesthesia, but the exact anesthesia I couldn't state.

[fol. 22] The Court: The amount given he couldn't state.

By Mr. Healy:

Q. Does the record here from the hospital show the amount, Doctor, that was given? That is all I want to know. Could you look this over and tell me that? A. The thing that was given here, I think, is CC-86. That's the formula. I don't remember exactly what this—

The Court: At what time did the doctor give the patient anesthesia before the actual operation?

By Mr. Healy:

Q. That's correct.

The Court: That is what Judge Healy wants to know. How long before the operation was the anesthesia given? You testified that the record shows the operation commenced at 5:00 a.m.

The Witness: Yes.

The Court: How long—

Mr. Healy: I don't think he did. I think he said in his opinion. The record doesn't show that. Maybe I misunderstood.

The Court: You may be right and I may be right. We'll see. Does the record show when the operation began?

The Witness: This is the operation card here.

[fol. 23] The Court: At what time?

The Witness: 5:00 a.m.

The Court: The record shows that?

The Witness: Yes.

The Court: 5:00 it started and 8:00 o'clock it ended?

The Witness: 5:00 o'clock, that's when they started the anesthesia.

The Court: At 5:00 they started the anesthesia.

Mr. Healy: Fine.

The Court: All right. We have it now.

By Mr. Healy:

Q. What does that mean, Doctor? You told us they gave him a certain amount. What does that mean? A. I really don't see what this formula stands for now. I would have to consult the anesthesiologist.

Q. What does the paper say? A. CC-86.

Q. What does CC-86 mean, will you tell the jury and the Court? A. I say it is the formula. I can't recall now exactly what it is.

The Court: But it does have reference to the amount given to the patient?

The Witness: No, no. This is the formula of the anesthesia.

The Court: You mean the kind of anesthesia?

The Witness: The kind of anesthesia; it does not indicate the amount.

[fol. 24] *By Mr. Healy:*

Q. And that record doesn't show the kind of anesthesia that was given? A. This is the agent; this is the kind of anesthesia, CC-86.

Q. But you don't know what it is? A. I don't recall what it stands for now.

Q. You don't know what it stands for. Well, did you tell us, Doctor, that you prescribed demerol; is that right? A. Yes.

Q. What is demerol? A. Demerol is a pre-anesthetic medicine.

Q. Yes. A. Its main action is to relieve pain.

Q. Deaden pain? A. Deaden pain.

The Court: Can you get the time, Judge Healy, when that was administered, if you can?

By Mr. Healy:

Q. Could you tell us what time demerol was prescribed for him? A. From our records it was stated here. It was given at 3:55 a.m.

Q. 3:55. Well, will that put you to sleep, demerol, Doctor? A. Well, it will make you—

Q. Dopey? A. It will make you dopey.

Q. And what was the other one, atropine—

The Court: Atropine, a-t-r-o-p-i-n-e-.

By Mr. Healy:

Q. Atropine, what is that? A. Oh, it is not atropine. [fol. 25] It is scopolamine.

Q. What is that, Doctor? A. It dries up the secretion.

The Court: It dries up the secretion?

The Witness: Of the throat and the pharynges and the upper respiratory tract.

The Court: Judge Healy, let me read from the record.

Mr. Healy: Go ahead.

The Court: Demerol 50 mgm; that means milligrams. Scopolamine. It says "gr"—I guess that means gram—1 over 150. Time initiated 3:55 a.m.

Mr. Healy: All right. Thank you, Doctor. That's all, Doctor.

Redirect Examination by Mr. Schor:

Q. Doctor, you just told us that demerol makes a person dopey; right? A. Yes, sir.

Q. How long does it take from the time it is administered until the patient feels the effect? A. Well, it manifests its action about fifteen minutes after it is injected.

Q. Fifteen minutes later? A. About fifteen minutes later.

Mr. Schor: Thank you very much.

Recross Examination by Mr. Healy:

Q. Doctor, just a minute. Doesn't the physical condi- [fol. 26] tion of the person to whom it is administered make some difference as to how long it will take to take effect? Wouldn't it take effect in a shorter time, perhaps, on one person than it might on another; isn't that so? A. In children, for example, the same dose might have a faster effect.

The Court: Judge Healy asked you, doesn't the physical condition of the patient to whom you inject have an effect on how long before it takes effect?

The Witness: Oh, no.

By Mr. Healy:

Q. It never would? A. Not much difference.

Q. So if a person was in good health and took demerol, the effect wouldn't be any different? A. Not much different.

Q. Please. Then if a man shot through the liver—is that right? A. Not much different.

Q. But there would be some difference, wouldn't there? A. Well, one or two—

Q. What? A. I couldn't say. I don't think there is much difference.

Q. You don't know, do you? A. No?

Q. You don't know, do you? A. I know, sir.

Q. But you say there is some difference. A. Well, fifteen minutes is usually the time of action after you inject it.

[fol. 27] Q. For a healthy person? A. For a healthy person, yes. It operates individually.

Q. How about a person who, for instance, has been shot through the liver, as your report shows there? Would that be the same time as for a healthy person? Do you mean that, Doctor? A. Yes, sir.

The Court: Before, you said "Not much difference," which means there is some difference; isn't that so?

The Witness: Well, I think there is not—I don't think it would make much difference.

The Court: All right. Anything else, gentlemen?

By Mr. Healy:

Q. Is there anything on that report to show when it did take effect? There isn't anything on there, is there? A. No.

Q. No? A. No.

Q. That report shows that this defendant had lost 500 cc's of blood. Now, would that make any difference in that time? A. I will have to check my records with that 500 cc's of blood.

Q. The report—the record shows that he had lost 500 cc's of blood. Now, I am asking you, would that make any difference in the time that this— A. I don't think so.

[fol. 28] Mr. Healy: That's all.

The Court: Step down.

* * * *

OBJECTION BY LEO HEALY, COUNSEL FOR NATHAN JACKSON

(The following took place at the bench, out of the hearing of the jury:)

The Court: I want to keep this to strict rebuttal.

Mr. Healy: That's right.

The Court: Judge Healy raised the point in cross-examination that sedation of a kind was administered to the patient.

Mr. Healy: Some kind.

The Court: And therefore he is going to contend and he does now that the confession hasn't the weight the law requires. Is that your purpose?

Mr. Healy: That's correct. There are two, one statement and another statement. One statement to the police and one statement to the District Attorney.

The Court: Well, the one to the police was what hour, I would like to know, and the one to the District Attorney was what hour?

Mr. Healy: The one to the police.

Mr. Schor: To the police, to Detective Kaile, at two [fol. 29] o'clock.

The Court: Get the statement.

Mr. Healy: The statement that I raised the point about. This is the statement taken by the District Attorney, by Mr. Postal.

The Court: Yes.

Mr. Healy: Mr. Lentini being the hearing reporter. That was taken at 3:55.

The Court: That's the time that you say he was in no mental condition to make the statement?

Mr. Healy: That's correct.

The Court: Is that correct?

Mr. Healy: That's correct.

* * * *

PEOPLE'S SUMMATION

Then Dr. Suarez. You may not want him as a Doctor; counsel may not want him as his Doctor, and I don't know whether I would want him as a Doctor. But

that is a personal matter. But do not criticize a professional man. He is here by invitation of the United States Government—so he said. He is here under the Visitors Exchange Program, commonly known [fol. 30] as the Fulbright Law. He is a physician duly accredited in the Philippine Islands, who came here, as we have sent our Doctors to the Philippines, and they send their Doctors here.

* * * *

CHARGE BY JUDGE HYMAN BARSHAY

Jackson testified he was shot. He was under a sedative. He said he was refused water unless he answered the questions as they wanted him to answer them. He said he remembers some questions and answers, and denied others. He had no recollection as to some questions and answers. He said that the statement which the District Attorney claims to be a confession was obtained from him in violation of law. You have heard all the testimony on that point, as well as on every other point. Now let me give you the law.

A confession of a defendant, says the law, whether in the course of a judicial proceeding, or to a private person, can be given in evidence against him unless made under influence of fear, produced by threats, or unless made on a stipulation of the District Attorney that he shall not be prosecuted therefor. Of course, in this case, there is no claim that the District Attorney made any such stipulation, so do not be concerned with that part of it.

Under our law, a confession is not sufficient to warrant a conviction without additional proof that the crime [fol. 31] charged has been committed. I will subdivide the two parts of the law. I will give you the first part first.

What does the law mean when it uses the word "confession"? It has been defined as an accurate and true statement made by a person declaring that he, the person, committed or participated in the commission of the crime charged.

The form of the confession is immaterial. It can be written. It can be oral. It may be signed and it may be

unsigned. It may be in question and answer form. It may be in detailed form, or it may be in answers to questions put to him. There is no exact form that the law requires a confession to be in.

If you determine that it was a confession, the statement offered here, and if you determine that Jackson made it, and if you determine that it is true; if you determine that it is accurate, before you may use it, the law still says you must find that it is voluntary, and the prosecution has the burden of proving that it was a voluntary confession. The defendant merely comes forward with the suggestion that it was involuntary, but the burden is upon the prosecution to show that it was voluntary.

Under our law, a confession, even if true and accurate, if involuntary, is not admissible, and if it is left for the jury to determine whether or not it was voluntary, its [fol. 32] decision is final. If you say it was involuntarily obtained, it goes out of the case. If you say it was voluntarily made, the weight of it is for you. So I am submitting to you as a question of fact to determine whether or not (a) this statement was made by Jackson, or allegedly made by Jackson, whether it was a voluntary confession, and whether it was true and accurate. That decision is yours.

Should you decide under the rules that I gave you that it is voluntary, true and accurate, you may use it, and give it the weight you feel that you should give it. If you should decide that it is involuntary, exclude it from the case. Do not consider it at all. In that event, you must go to the other evidence in the case to see whether or not the guilt of Jackson was established to your satisfaction outside of the confession, beyond a reasonable doubt.

If you should determine that Jackson made this confession, and that it was a true confession, and you have so determined from the evidence, then if you should decide that it was gotten by influence, of fear produced by threats, and if that is your decision, then reject it.

I repeat to you again, the burden of proving the accuracy, truth, and the voluntariness of the confession always rests upon the prosecution.

[fol. 33] * * * *

REQUEST TO CHARGE BY LEO HEALY, COUNSEL FOR NATHAN JACKSON

Mr. Healy [a defense counsel]: All right. I have one more request. On the question of the validity of the alleged confession or statement of Jackson, your Honor charged, I believe properly, as to what it says on the statute books, as to when a confession may be considered voluntary. I have no exception to that, but I do ask your Honor to go further and say in deliberating whether or not Jackson's confession was voluntary, they had a perfect right to take into consideration at the time it was made, his physical condition in determining the voluntary nature.

The Court: I think I included all the circumstances then present; that he was under sedation, Judge Healy. I said, "Jackson testified he was shot; and he was under sedation; that he was refused water unless he answered the questions as they wanted him to." I have already covered that subject matter and I decline to charge further as requested.

Mr. Healy: My exception is although you quoted perfectly, in my opinion you left the impression with the jury that the only time they could consider whether the confession was voluntary or not, was whether for instance as you read, and you did read this part, that the District Attorney made a promise to him, or that the confession was given under fear. I say in this case, in justice to [fol. 34] this defendant, not only where a promise is made to him or that he was in fear, as your Honor correctly read from the Statute, but this jury had a perfect right to take into consideration his physical condition.

The Court: I did exactly that.

Mr. Healy: I respectfully except to your Honor's refusal to so charge. I think that is the law.

[fol. 35]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 402—September Term, 1961

Argued August 21, 1962

Docket No. 27662

UNITED STATES OF AMERICA, ex rel. NATHAN JACKSON, RELATOR-APPELLANT

against

WILFRED L. DENNO, as Warden of Sing Sing State Prison, Ossining, New York, RESPONDENT-APPELLEE

OPINION—November 2, 1962

Before:

LUMBARD, *Chief Judge*,

MOORE and MARSHALL, *Circuit Judges*.

Appeal from an order of the United States District Court, Archie O. Dawson, D. J., which denied appellant's application for a writ of habeas corpus. The District Court's opinion is reported in 206 F. Supp 759 (1962). Affirmed.

DANIEL G. COLLINS, New York, N. Y., *for Relator-Appellant.*

[fol. 36]

WILLIAM I. SIEGEL, Assistant District Attorney, Kings County, N. Y. (Edward S. Silver, District Attorney, Kings County, N. Y.), *for Respondent-Appellee.*

MOORE, *Circuit Judge:*

Appellant, under sentence of death as a result of a judgment of conviction of first degree murder in the County Court of Kings County, New York, appeals from an order of the District Court for the Southern District of New York, denying his application for a writ of habeas corpus. State remedies have been exhausted.

The primary appellate question is whether appellant was deprived of his constitutional right to a fair trial because of the introduction into evidence of a statement by him which was stenographically transcribed, sometimes herein referred to as a confession. The answer turns upon the circumstances under which it was given. We find no such deprivation and affirm the order.

In the early morning of June 14, 1960, appellant while escaping from the scene of an armed robbery committed by him shot and killed a police officer. He was wounded by the police officer in the exchange of gunfire and sought hospitalization. Shortly after admission to the hospital while in the X-ray room and at approximately 2:00 A.M., appellant said to a detective, "I shot the colored cop. I got the drop on him." At 3:55 A.M., an assistant district attorney took a question and answer statement from appellant, immediately after appellant had been given "demerol", a drug with pain alleviating properties, as a pre-anesthetic, pre-operative procedure. There was medical testimony that except perhaps in the case of children demerol "does not manifest its action" until about fifteen minutes after injection. The defense offered no proof [fol. 37] contradicting the prosecution's medical witness on this point. Nor was there any dispute that the questioning of appellant lasted no more than about five minutes.

On the trial appellant was represented by an attorney, a former judge, experienced in the defense of criminal cases. The statement (Exhibit 14) was offered in evidence during the testimony of a stenographer employed by the District Attorney of Kings County. The trial record reads: "The Court: Any objection? Mr. Healy [appellant's counsel], No." The Court inquired as to whether

appellant's counsel had a copy of the statement and was advised by counsel in the affirmative. The statement contained appellant's version of the events leading up to the shooting. Appellant said in substance that in the early morning he went to a hotel with a woman to get a room but not with an original intent to do a "stickup"; that when he was recognized by the desk clerk he decided to rob her which at gun-point he proceeded to do; that he herded the clerk and others into a room; that on the street he was accosted by a police officer who insisted that appellant accompany him; that he threw the officer to the ground; that the officer drew his gun but appellant "got mine out first" and in the firing he (appellant) beat him to it." On cross-examination appellant's counsel brought out the five-minute duration (3:55 A. M. to 4:00 A. M.) of the statement and appellant's claim during that period that he could not go on.

Appellant took the stand in his own defense. He gave a detailed account of the events of the day, his drinking, his going to the hotel with the woman, the robbery, his struggle with the police officer, the officer reaching for his gun but appellant getting his gun out first, the exchange of shots and the hospitalization. Appellant claimed [fol. 38] that, although they gave him some water once, he was told that he could not have any more unless he answered questions.

Upon rebuttal, the prosecution offered medical testimony that demerol would not take effect for about fifteen minutes. In addition, testimony was given by two hospital attendants present during the period involved that appellant was not told that water would be refused unless he answered questions. Their testimony was that they told him that hospital procedure required that they not give water to pre-operative patients [the operation commenced at 5:00 A.M.]. The events at trial indicate that it was the decision of defendant's skilled counsel (1) not to object to the introduction of appellant's statement and (2) to have appellant testify in his own behalf. The prosecution had the right "to rely on the decisions made by counsel and the defendant himself." (*United States* v. *Richmond*, 2 Cir., 1961, 295 F. 2d 83, 90, rehearing de-

nied, October 11, 1961, certiorari denied, 368 U.S. 948, 82 S. Ct. 390, rehearing denied 368 U. S. 979, 82 S. Ct. 485, leave to file second petition for rehearing denied, 369 U. S. 881, 82 S. Ct. 1145 (1962)).

Despite the admission of appellant's statement without objection, the trial court, in effect, preserved for appellant the right to attack it because after appellant had rested and during rebuttal the trial court said, "Judge Healy raised the point in cross-examination that sedation of a kind was administered to the patient. * * * And therefore he is going to contend and he does now that the confession hasn't the weight the law requires. Is that your purpose?" To this counsel said, "That's correct". The prosecution then called witnesses limited to this point, as abovementioned, denied that water was refused unless questions were answered.

The summation of appellant's counsel clearly discloses his trial strategy both as to his unwillingness to object [fol. 39] to the statement and as to his calling appellant to the stand. He must have been convinced as a result of his almost fifty years of experience that he would serve his client best if he did "not ask you [the jury] to acquit Jackson" but to argue it "on a proposition of law, that any guilt that is his is murder in the second degree, or manslaughter * * * *". In summary, his approach was to convince the jury, if he could, that the killing was "without the premeditation" (murder in the second degree) or was manslaughter "where there is no need for premeditation or deliberation or intent * * *." Counsel's "theory of defense" against felony murder was to separate the felony (robbery), which he argued had terminated, from the killing during appellant's attempt to escape. This, counsel argued, was "the crux of the defense". The balance of the summation as far as material to this point was devoted to a thorough analysis of the facts designed to convince the jury that the killing was without premeditation and deliberation. Counsel also attempted to sway the jury to his "unpremeditated" theory in his explanation that he "wanted you [the jury] to hear everything in the case," and appellant to have "his day in court". By calling him he was able to bring out appellant's drinking which he

argued bore upon his mind and intent at the time of the shooting. The final plea to the jury was that when "the query is propounded to you as to how you find the defendant Jackson, guilty or not guilty, you will say either guilty of murder in the second degree or manslaughter in the first degree."

The trial court in a lengthy charge instructed the jury with clarity and accuracy as to the necessary elements of murder, first (common law) and second degrees, manslaughter, first and second degrees, and felony murder. As to the statement or confession, the court charged that even if the statement were found to be made by ap- [fol. 40] pellant and to be true and accurate "before you may use it, the law still says you must find that it is voluntary, and the prosecution has the burden of proving that it was a voluntary confession." The court then instructed the jury as to their fact-finding function with respect to the three elements (1) whether the statement was made by appellant; (2) whether it was voluntary; and (3) whether it was true and accurate, adding that if it were found to be involuntary that they were to exclude it from the case. Only one exception to the court's charge was taken by appellant's counsel, and this was unrelated to appellant's statement. Of appellant's requests to charge, counsel asked that the jury be instructed that in determining whether the statement was voluntary they had a right to take into consideration appellant's physical condition. The court replied, "I did exactly that", and referred to his charge on this point which reads:

> Jackson testified he was shot. He was under a sedative. He said he was refused water unless he answered the questions as they wanted him to answer them. He said he remembers some questions and answers, and denied others. He had no recollection as to some questions and answers. He said that the statement which the District Attorney claims to be a confession was obtained from him in violation of law.

The jury returned a verdict of first degree murder with no recommendation. In the New York Court of Appeals,

the judgment of conviction was affirmed without opinion (10 N. Y. 2d 780); motion for reargument denied (10 N. Y. 2d 885); motion to amend the remittitur granted to show that questions under the Constitution of the United States were passed upon, viz., possible coercion and physical condition at the time of taking the statement (10 N. Y. [fol. 41] 2d 816); certiorari was denied by the Supreme Court (368 U. S. 949) as was a further motion for reargument in the New York Court of Appeals (11 N. Y. 2d 798). A petition for a writ of habeas corpus was then sought in the District Court. From the denial of the writ, this appeal has been taken.

The district court examined the entire state record (823 printed pages) to determine whether the state processes had given full consideration to the issues and had resulted in any denial of constitutional rights. The court concluded that it had thereby been afforded an adequate opportunity to weigh the sufficiency of the allegations and the evidence. Hence, it found that there was no necessity for holding a hearing. *Brown* v. *Allen*, 344 U. S. 443 (1952). In its opinion it carefully analyzed the facts and circumstances relating to appellant's statement and the trial court's charge with respect thereto. Its conclusion was that "There is no good reason to find that the confession of the defendant was involuntary, or that the court's instructions to the jury on the question of voluntariness were inadequate, erroneous or prejudicial, or that the New York procedure for determining the voluntariness of confessions is violative of due process as a matter of law."

The scope of federal review and the applicable principles thereon are sufficiently well established so as not to require a detailed restatement but only a practical application to the facts. The decisions of the Supreme Court "have made clear that convictions following the admission of evidence of confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological, cannot stand." *Rogers* v. *Richmond*, 365 U. S. 534, 540. Nor is it a "permissible standard" for admission to take "into account the circumstance of probable truth or falsity." (p. 543). As the Supreme Court said in *Rogers*, the question

[fol. 42] is "whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth." (p. 544). Furthermore, if a confession "was in fact involuntary, the conviction cannot stand, even though the evidence apart from that confession might have been sufficient to sustain the jury's verdict." (*Stroble* v. *California*, 343 U.S. 181, 190 (1952); *Malinski* v. *New York*, 324 U. S. 401, 402, 404 (1945); *Lyons* v. *Oklahoma*, 322 U. S. 596, 597 (1944).)

Adhering to these standards, the district court and this court have examined the entire state record. The facts surrounding the giving of appellant's statement are undisputed with one exception. The so-called statement or confession was given over a period of five minutes (3:55 AM-4:00 AM) and consisted of questions by an assistant district attorney and answers by appellant. No claim was made by appellant that any physical force was used or threatened or that the statement was the result of deception, ruse, false promises or guile. The questioning was not conducted in a police station with the potentially menacing presence of many police officers or conducted over an interminable period by a series of inquisitors. To the contrary the statement was given to a stenographer in a hospital room where appellant was in bed. The only dispute in testimony is found in appellant's claim that if he wanted some more water ("They gave me some water once") he could not have it until he answered the questions "the way they wanted me to answer them". In contradiction, the stenographer, a nurse's aide and a practical nurse who were present, all testified that no such conditions were imposed. The testimony was that the refusal of more water was because of the mandatory re-[fol. 43] quirement of no food or water to any patient at such a pre-operative stage.

With the entire state court record before us, the court is clearly convinced that there are no facts which tend to show that the appellant's statement was "not freely self-determined". The court is buttressed in this convic-

tion by the fact that appellant took the stand and recited at length and with the greatest particularity the events of June 13 and 14th, 1960. Had any coercion; physical or psychological, been exerted, would he not have been the first to mention it? Yet the only intimation of any inducement to answer questions are the flatly contradicted "more water" and the wanting to be "left alone" claims.

The reliance which appellant places upon the injection of demerol as possibly causing a "loss of will-power" is not well founded. His hypothesis is "if the drug—had taken effect at the time he confessed—." The undisputed proof was that any effect would not have commenced until at least ten minutes after the statement had been concluded. Although appellant had full opportunity to offer proof to the contrary if such existed, he did not do so. *Griffith* v. *Rhay*, 9 Cir., 1960, 282 F. 2d 711, although it discussed demerol which had been frequently administered to the defendant there for several days before he gave his statement, was decided upon the specific ground of the defendant's right to the assistance of counsel. The findings of the district court that oral admissions and the signed confession "were the result of his free and voluntary act" were not the basis of the reversal.

Appellant contends that the well-known New York procedure for determining the voluntariness of confessions is not in accord with the requirements of due process and that its use here vitiates the conviction. By this procedure, unless the judge finds that as a matter of law a con- [fol. 44] fession is involuntary, he submits the question of voluntariness to the jury, with instructions that the confession be considered only if it is found to be voluntary. This procedure was approved by the Supreme Court in *Stein* v. *New York*, 346 U. S. 156 (1953), and has not been disturbed by later rulings. See e.g., *Spano* v. *New York*, 360 U. S. 315 (1959); *Payne* v. *Arkansas*, 356 U. S. 560 (1958). Although ordinarily the procedure includes a preliminary hearing as to admissibility, so that a confession can be excluded if found by the judge to be involuntary, the absence of such a hearing in this case is not error, since counsel for the defendant was asked explicitly whether he objected to use of the confession

and he replied explicitly that he did not. To hold otherwise would, in effect, be to declare that all out-of-court statements of defendants made to officials connected with the discovery or prosecution of crimes are presumptively involuntary and can be offered in evidence only following a hearing. There is no basis in fact or law for such a presumption.

The evidence here establishes that all the required safeguards of legal procedure have been afforded to the appellant.

The order denying the writ is affirmed.

[fol. 45]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * * *

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*,
HON. LEONARD P. MOORE,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES ex rel. NATHAN JACKSON,
RELATOR-APPELLANT

v.

WILFRED L. DENNO, as Warden of Sing Sing State Prison, Ossining, New York, RESPONDENT-APPELLEE

JUDGMENT—November 2, 1962

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

[fol. 46]

[File Endorsement Omitted]

[fols 47-58] * * *

[fol. 59]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 60]

IN THE COUNTY COURT OF KINGS COUNTY, NEW YORK

TRIAL TERM—PART IV

THE PEOPLE OF THE STATE OF NEW YORK

- against -

NATHAN JACKSON, NORA ELLIOT, DEFENDANTS

(Ind. No. 2245/1960: Murder 1st Degree.)

EXCERPTS OF TRANSCRIPT OF TESTIMONY

Brooklyn, New York
September 27th, 1960.

BEFORE:

HON. HYMAN BARSHAY

County Judge,
(and a special jury.)

* * * *

[fol. 61] * * * *

[fol. 62]

* * * *

(After a short recess, the jurors returned, the roll was called by the Clerk of the Court, and the trial was resumed.)

The Court: Call your next witness.
Mr. Schor: Detective Kaile.

JOHN KAILE, police detective of the City of New York, Shield No. 2516, attached to the 80th Squad, Brooklyn,

New York, called as a witness for the People, being duly sworn by the Clerk, testified as follows:

Direct Examination by Mr. Schor:

Q. Detective Kaile, to what squad were you assigned on June 14th, 1960? A. I was assigned to the 80th Squad.

Q. And were you in the squad office at approximately about 1:20—1:15 that morning? A. Yes, I was.

Q. And did the switchboard of the police station give you a communication at about that time, yes or no? A. Yes.

Q. And are you now the police officer in charge of the investigation of the alleged killing of Patrolman Ramos? A. That is correct, I am.

[fol. 63] Q. You are what we call in the parlance of the criminal courts, "carrying the case", is that right? A. That is correct.

Q. After you received this communication, did you go somewheres? A. I did.

Q. Where did you go? A. I went to 1124 Fulton Street.

Q. And about what time did you arrive there? A. I arrived there approximately 1:30 A.M.

Q. And when you arrived there, had Patrolman Ramos been taken already to the hospital? A. That is correct.

Q. And the defendants Elliott and Jackson were not there, is that correct? A. That is correct.

Q. Did you spend some time at the scene? A. I did.

Q. And where did you go from there? A. After I left the scene, I went to Cumberland Hospital.

Q. Did you go to any particular room at the hospital? A. I went to the X-ray room at that hospital.

Q. And whom did you see there? A. I saw the defendant Nathan Jackson.

Q. Did you have a conversation with him in the hospital, the X-ray room? A. I did.

Q. About what time was that? A. About two A.M.

Q. Tell us what the conversation was about? A. I asked him what his name was. He stated to me, "Nathan Jackson. I shot the colored cop. I got the drop on him."

Mr. Solovei: May we have the same ruling with respect to this testimony so that the jury will understand [fol. 64] it is binding only on Jackson?

The Court: Yes, they may consider it only with respect to the defendant Jackson.

The Witness: Question; "Who were you with?" "I was with Nora, I don't know her last name. I met her at the 722 Club." Question: "How long do you know her?" "I have met her at the 722 Club about three or four times. The first time was about a month ago. This is the first time I went out with her."

The Court: Yes; proceed.

The Witness: I then left the X-ray room, and about twenty minutes later, returned to the X-ray room, where I had another conversation with the defendant Jackson.

The Court: The same ruling, gentlemen, with respect to the defendant Elliott.

The Witness: I asked him, Jackson, if he went to the hotel room—to the hotel with Nora. He said he did. I asked him, "Who signed the register?" He said, "Nora signed the register. I told her to. Then the woman knew me. I pulled the gun and stuck her up." Question: "Where did you get the gun?" "I bought the gun from Smokey. He hangs out on Greene Avenue and Grand Avenue." That was the conversation with Nathan Jackson.

By Mr. Schor:

Q. Sometime later that morning, did you go to the 79th Squad; yes or no? A. Yes.

[fol. 65] Q. Did you see Detective Dudly there, yes or no? A. Yes.

Q. Did you see the defendant Nora Elliott there? A. I did.

Q. Did you take her from the 79th Squad to the 80th Squad? A. I did.

Q. Did you have a conversation with the defendant Elliott at the 80th Squad?

The Court: Gentlemen of the jury, the ruling is the same as before; you may only consider this evidence as

against the defendant Elliott, and not as against the defendant Jackson.

The Witness: I did.

By Mr. Schor:

Q. Tell us what that conversation was? A. The Question was: "Did you and Nathan go to the hotel?" "Nathan and I went to the hotel. I was tired and wanted to go to sleep. I know Nathan eight months." Question: "Who signed the register?" "I did. Nathan told me to." Question: "What happened between Nathan and the patrolman?" Answer: "We were in the cab. I didn't see the cop near the cab. I got out first and then Nathan got out. I picked up the stick when Nathan and the cop were fighting." Nathan said; "Hit him." I didn't. I dropped the stick." Question: "What happened then?" Answer: I heard a shot. I dropped the stick"—excuse me, there was another question prior to this. I asked her whether she had swung the stick at the patrolman, and she said, "I don't know whether I did or not. I probably swung the stick. I don't remember." Question; "What happened then?" "I picked the stick up. I heard a shot, and [fol. 66] I dropped the stick, and I run to Franklin Avenue." That was the conversation with Nora Elliott.

Q. Did you go back to the Cumberland Hospital that day? A. I did.

Q. Did you see Jackson there? A. I did.

Q. Was he still in the X-ray room? A. No.

Q. About what time was this? A. This was about three P. M., on the 14th of June.

Q. Where was Jackson? A. Jackson was in Ward 46, lying in bed.

Q. Did you talk with him? A. I did.

Q. When you went to the Cumberland Hospital this time, about three o'clock, did you have Nora Elliott with you? A. Yes, sir.

Q. Did you take her into Ward 46? A. Yes, sir, I did.

Q. Was she standing with you at the bedside of Nathan Jackson? A. She was standing at the foot of the bed.

Q. Did you say something to Jackson? A. I did.

Q. What did you say? A. I asked him if he knew this girl. He said, "This is Nora. This is the girl I was with last night."

Q. Did you say something then to Nora Elliott? A. I did.

Q. Right there? A. That is correct.

Q. In the presence of Jackson? A. I walked over towards Nora—

Q. What did you say to her? A. I said, "Nora, is this Nathan?" She said, "This is Nathan, this is the fellow I was with last night."

Q. Now I show you Peoples Exhibit 8 in evidence, this policeman's night-stick, and ask you when for the first time you saw it? A. I saw this—I saw the night-[fol. 67] stick early June 14th. It was given to me by Lieutenant Boxer, who was the desk officer at that time at the 80th Precinct.

Q. What did you do with the night-stick? A. The night-stick was taken to the property clerk's office.

Q. And did it remain there at the Property Clerk's office until you went to the Grand Jury? A. That is correct.

Q. And after you testified in the Grand Jury, did you take it back to the Property Clerk's office? A. I did.

Q. And when this trial started last week, did you bring it back here? A. I did.

Mr. Schor: You may examine.

Cross Examination by Mr. Healy:

Q. Detective Kaile, you told us of two separate conversations you had with Jackson, is that right? A. That is correct.

Q. And the first one was at what hour? A. The first one?

Q. Yes. A. About two o'clock; two A.M.

Q. Two o'clock in the morning? A. That is correct.

Q. And where did you see Jackson at that time? A. He was in an X-ray room.

Q. What position was he in in the X-ray room? A. He was lying down.

Q. On his back? A. He was on the side.

Q. Were there Doctors there? A. No, at that time, there were no Doctors there.

Q. Did you ascertain that Doctors had been there prior to that time? A. He was—at the time I arrived at the [fol. 68] X-ray room, he was just wheeled into the room.

Q. And did you see him wheeled in? A. I did.

Q. On a stretcher? A. That is correct.

Q. Did you ascertain that he had just been operated on? A. Yes, sir. He was just brought in from—I ascertained that he was brought up from the emergency room.

Q. What I am interested to know is this. You knew that he was shot, do you not? A. That is correct.

Q. And did you ascertain that he was shot twice? A. At that time, I didn't know how many times he was shot.

Q. Have you since ascertained he was shot twice? A. I have found that out.

Q. And you ascertained in what part of his body the two bullets entered? A. I did.

Q. Tell the jury; tell us what part of the body? A. I believe they entered the abdomen; the area of the abdomen.

Q. Both of them? A. That is correct.

Q. Did you ascertain whether the Doctors that operated on him before you started to talk to him—

The Court: The first time.

The Witness: Yes.

By Mr. Healy:

Q. And when you saw him at that time, the first time, was his condition weak, would you say? A. No, I would say "no, sir."

Q. Strong, is that right? A. Strong.

Q. And he did not ask you to postpone the questioning for a while? A. He did not.

[fol. 69] Q. Or words to that effect? A. He did not.

Q. This was at what time? A. This was at about two A. M.

Q. You subsequently notified the District Attorney to come there, didn't you? A. Yes, but I don't recall whether I notified them.

Q. You knew that through Police channels they were notified to come there? A. Yes, sir.

Q. Do you know that they got there about five minutes to four? A. I don't know whether they got there that late.

Q. Do you know when the District Attorney got there, and there were questions propounded to Jackson, and answers were made, and that he made a statement? A. Yes, I understand that he made a statement.

Q. And you know that in that statement about four o'clock in the morning, he told the District Attorney that he could not go on; he was too weak? A. I didn't hear him say that because I wasn't there at the bedside.

Q. Were you there when the District Attorney was questioning him? A. No, I was not.

Q. Did you yourself at any time hear Jackson say to whoever was questioning him, you, or anybody else, "Look, I can't go on." A. I never heard him say that.

Q. Never heard that, did you? A. No.

Q. Now, where were you when the District Attorney was questioning Jackson? A. At the time exactly when the District Attorney was speaking to Jackson, I don't know whether—I was in the hospital, and then after the hospital, I left and went to the 80th Squad.

Q. Well, did you ask Jackson, that when he first went to the room with Nora, if he went there for the purpose [fol. 70] of committing a stickup? A. I didn't ask him that question.

Q. Did you hear at any time any police officer or any one from the District Attorney's office ask him that question, and he making an answer to that? A. My recollection is I never heard anybody ask him that question.

Q. Did you hear Jackson at any time say to you or to any other official, District Attorney or police, that he did not go there originally to commit a stickup? A. No, sir.

Q. Did Jackson say to you or to any other official that was examining him, that the first time he decided to commit a stickup was when the lady recognized him? A. He told me when she knew him he stuck her up.

Q. And did he say that when he saw that the lady knew him, that that was when he decided to stick the place up? A. That is correct.

Q. Didn't you ask him whether he decided to stick it up before he went in there? A. I did not ask him that.

Q. The lady told you that they went up there to sleep, is that right? A. Nora stated to me that she went up there to sleep.

The Court: There are two ladies concerned here. Mention the name.

Mr. Healy: I am sorry, Judge; I should have said Nora.

The Court: Proceed.

By Mr. Healy:

Q. You questioned him about what took place in the hotel, that is, about the stickup, is that correct? You told him about sticking up the hotel, and he said he [fol. 71] stuck it up, is that right? A. Yes.

Q. Now did you ask him what he did after he stuck up the lady? A. No, I did not.

Q. What? A. I did not.

Q. Did he tell you that after he stuck up the place, that he was out in the street, and he met the officer and he had a talk with the officer? A. No, he did not.

Q. Did he tell you that out on the street he told the officer that there was a fight in the building, and that the officer asked him to go back in the building with him? A. He never told me anything.

Q. He did not tell you that?. A. No.

Q. Did you hear him say that to any one else, District Attorney or any one else? A. I did not hear him say that to any one.

Q. As I understand it, you yourself did not have any conversation with Jackson about how many shots were fired at him, or by the policeman, is that correct? A. That is correct.

Q. That was by some other member of the Department? A. By some one else.

Mr. Healy: I think that is all.

The Court: Do you want to question him, Mr. Solovei?
Mr. Solovei: Yes.
The Court: Proceed.

Cross Examination by Mr. Solovei:

Q. Officer, you were carrying this case, is that correct? A. That is correct.

Q. And did you make out a "D.D.4" report or a "D.D.5" report rather? A. Yes, I did.

[fol. 72] Q. Have you got the "DD5" report with you? A. Relative to what on the DD5?

Q. Relative to this case? A. Yes.

Q. Have you got it with you? A. Yes.

Mr. Solovei: Will your Honor look at it please and see whether I can see it?

The Court: Yes. Let me have it, officer. Proceed with your questioning in the meantime.

Mr. Solovei: Shall I proceed, your Honor, while you are reading it?

The Court: Yes.

By Mr. Solovei:

Q. Did you also make out a "U.F.61"? A. The "61" is prepared by the 124 man.

Q. You are carrying the case, aren't you, and aren't you supposed to make out the "DD5" and "U.F.61"? A. The original "61" is made out by the desk officer. I subsequently made a report on it.

The Court: Gentlemen of the jury, these are police reports that they speak of, and those are the numbers by which they identify them.

By Mr. Solovei:

Q. Did you personally make out the "U.F.61?" A. The only—

Q. Yes or no; did you? A. No.

Q. Did you sign the "U.F.61"? A. I signed the "61."

Q. And have you the "U.F.61" that you signed here? A. I have.

[fol. 73] Q. Will you please show that to the Judge? A. The "61" is amongst the folder that the Judge has now.

The Court: Consider the "D.D.5" marked for identification. That is dated June 18, 1960. Is that correct?

The Witness: Yes.

(Considered marked Court Exhibit 11 for Identification.)

The Court: The "U.F.61" is dated June 14th, 1960.

(Considered marked Court Exhibit 12 for Identification.)

The Court: Step up, Mr. Solovei, with the District Attorney and the stenographer.

(The following too place not in the presence of the jurors.)

The Court: The "D.D.5" and the "U.F.61" contain the same matter as the detective has testified to here.

Mr. Solovei: May I look at it?

The Court: Yes, you can look at it. Let the record show that both of these documents are handed over to Judge Solovei.

(The following took place in the presence of the jurors.)

The Court: You may proceed.

[fol. 74] *By Mr. Solovei:*

Q. When you arrested the defendant Nora Elliott, you spoke to her, I understand you to say that you propounded some questions, is that correct? A. Yes, sir.

Q. And she made answers to your questions? A. Yes.

Q. And you asked her whether she went to the hotel, and she said "Yes."? A. Yes.

Q. And she told you that she was tired and went there to go to sleep with the defendant Jackson, is that correct? A. That is correct.

Q. And you also asked her whether or not she at any time picked up the stick and struck the policeman, she said, "I did not," isn't that correct? A. She stated she picked up the stick but did not hit the officer.

Q. And you also stated here a little while ago that you spoke to her—she also stated that Jackson says, "Hit

him," and she said, "No, I would not," or did not, is that correct? A. That is correct.

The Court: Return the papers to the officer.

Mr. Solovei: That is all.

The Court: Step down, officer.

Mr. Solovei: Just a moment, Sir; something has just been called to my attention.

The Court: Go ahead.

By Mr. Solovei:

Q. And she also said, as my record shows, when she heard a shot, she dropped the stick? A. Yes.

[fol. 75] Q. And then she left the place where the shooting, or whatever took place at that particular time, isn't that right? A. That is correct.

Mr. Solovei: That is all.

Redirect Examination by Mr. Schor:

Q. During one of the questions that you asked her about whether she struck the officer, she also said, "I don't remember", isn't that so?

Mr. Solovei: I object to that.

The Court: Objection overruled.

Mr. Solovei: I except.

The Witness: She stated, "I don't remember. I may have swung the stick at the officer."

Redirect Examination by Mr. Schor:

Q. Now going back to the Cumberland Hospital, you told Judge Healy on cross-examination that an Assistant District Attorney did arrive there, is that correct? A. That is correct.

Q. What is the name of the Assistant District Attorney? A. Assistant District Attorney Postal.

Q. And I think you told us that you were not present during the interrogation by the Assistant District Attorney of the defendant Jackson, is that right? A. That is correct.

Q. So that any questions that were asked by Mr. Postal, or any answers that the defendant Jackson may have made, were not made in your presence? A. That is correct.

[fol. 76] Q. You were not there at the time? A. That is correct.

Mr. Schor: I have no further questions.

Recross Examination by Mr. Solovei:

Q. Were you at the 80th Precinct when Nora Elliott was being questioned? A. Yes, I was.

Q. And you were there all throughout the entire questioning of Nora Elliott? A. I believe I was.

Q. And did you participate in the questioning? A. No, I did not.

Q. Did you suggest any questions to the Assistant District Attorney that was in charge, to ask Nora Elliott at the time? Did you, yes or no? A. I don't believe I did.

Q. You were the officer that carried the case, is that correct? A. That is correct.

Q. And didn't the District Attorney and you confer during the questioning of Nora Elliott, yes or no; did you or didn't you? A. Not during the questioning.

Q. Did you confer prior to the questioning? A. I did.

Q. How soon prior to the questioning did you and the Assistant District Attorney confer with each other? A. A short time. As soon as he arrived, I conferred with the District Attorney.

Q. Now then you went in the room and he went and questioned Nora Elliott, is that right? A. That is correct.

Q. How long would you say that Nora Elliott was being questioned by the Assistant District Attorney at the 80th Precinct on June 14th, 1960? A. About fifteen minutes.

[fol. 77] Q. Is that all; fifteen minutes? A. That is all, yes, sir,

Q. Do you know what time of the day she was being questioned? A. The time?

Q. Yes. A. I don't remember the exact time but I know it was sometime before noon.

Q. Was there at any time a break in the questioning? What I mean is, that the District Attorney or the Assistant District Attorney questioned her, and then there was a lull, or an adjournment taken for a few minutes,

or something like that; or was it continuous questioning? A. To the best of my knowledge, I don't remember whether there was a break or not.

Q. And you say it was about fifteen minutes? Is that right? A. About fifteen minutes.

Q. Sure it was not about an hour? A. No.

Q. Was there anybody else present at the time that the Assistant District Attorney was questioning Nora Elliott at the 80th Precinct? A. There was a stenographer present; an assistant district attorney, and I do not recall who else was there at the time.

Q. Was she crying at any time? A. Was she crying?

Q. Yes. A. I don't remember.

Q. Was she alone at all times, as far as Elliott is concerned, other than you and the assistant district attorney? A. I don't understand your question.

Q. I mean, she had no lawyer there; nobody representing her?

Mr. Schor: That is objected to.

The Court: Objection sustained. Disregard that, gentlemen of the jury.

[fol. 78] *By Mr. Solovei:*

Q. Did anybody represent her at that particular time while you were questioning her—

Mr. Schor: That is objected to.

The Court: Do not infer, gentlemen, that she was entitled to counsel at that time. In fact, no lawyer was there, isn't that true?

The Witness: That is correct.

By Mr. Solovei:

Q. Was she seated in a chair? A. She was seated in a chair.

Q. And there was a stenographer there and he took down the questions stenographically?

Mr. Schor: At this point, I object to this as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

By Mr. Solovei:

Q. There was a stenographer there? A. Yes, sir.

Q. And you heard Nora Elliott tell the Assistant District Attorney at that time that she did not strike the officer?

The Court: Mr. Solovei, aren't you at this point making him your witness?

Mr. Solovei: No, I am not.

The Court: I disagree with you but you may proceed.

Mr. Solovei: I except. That is all.

The Court: I said, you may proceed.

[fol. 79] Mr. Solovei: I have no further questions.

The Court: Step down, officer.

Mr. Solovei: May I ask one question of this officer at this time?

The Court: Yes.

By Mr. Solovei:

Q. Officer, Nora Elliott and you were in the police station, at the 80th Precinct, for some time prior to the assistant district attorney arriving there, isn't that correct? A. Yes.

Q. And while you and Nora Elliott were in the 80th Precinct police station, you were continuously questioning her, isn't that correct? A. No.

Q. Did you ask her a lot of questions; yes or no? A. I asked her questions.

Q. How long were you asking her questions before the Assistant District Attorney arrived? A. The time of questioning by me was about fifteen minutes; ten minutes.

Q. Did you write it down? A. Yes, I did.

Q. And did you make some memorandum of your own? A. I did.

Q. And then you conferred with the Assistant District Attorney, is that correct; and then he came in and questioned her? A. Yes.

Mr. Solovei: That is all.

The Court: Step down, officer. Next witness, please?

Mr. Schor: Detective Rorke.

[fol. 80]

CHARLES V. RORKE, police detective of the City of New York, Shield No. 1337, attached to the Ballistics Squad, N. Y. City Police Department, called as a witness for the People, being duly sworn by the Clerk, testified as follows:

Direct Examination by Mr. Schor:

Q. Detective Rorke, you are a detective from the Police Department of the City of New York, is that correct? A. Yes, sir.

Q. And are you attached to any particular Bureau? A. Yes, I am with the Ballistics Squad.

Q. On June 14th, 1960, did you go to the Cumberland Hospital? A. Yes, sir, I did.

Q. And did you see Patrolman Keeney there? A. Yes, I did.

Q. Did he give you something? A. He did.

Q. What did he give you? A. A revolver.

Q. I show you Peoples Exhibit 11 for Identification and I ask you whether that is the revolver that he gave you? A. Yes, sir.

Q. What did you do with that revolver, Sir? A. I took it with me to the Ballistics Squad where I tested it with Detective Burke, who is assigned to the Squad I am.

Q. Who made the test, Detective Burke or you? A. I did.

Q. Did Detective Burke make some tests? A. He was in my company when I tested the gun. We were standing there, but I actually fired the gun. He was standing next to me.

The Court: Tell the jury what tests you made. We don't know anything about that.

The Witness: I fired four rounds of .22 calibre ammunition through the gun.

[fol. 81] The Court: From this gun?

The Witness: Yes, sir, fired into cotton waste.

The Court: Tell the jury those things. They do not know why you did it, and what you did. Tell the jury that.

The Witness: The gun is test-fired in order to obtain specimens which can be compared with other evidence

that we have, to determine whether or not the bullet that we have in evidence in this particular case were fired from the gun that we have.

The Court: For comparison purposes?

The Witness: That is right.

The Court: Proceed.

By Mr. Schor:

Q. And did Detective Burke make the comparison tests? A. He did, Sir.

Q. In your presence? A. No, I was not present.

Q. But you were the one that fired the guns by putting bullets into the cylinder, is that right? A. That is correct.

Mr. Schor: You may examine.

Mr. Healy: No questions.

Mr. Solovei: No questions.

The Court: Mr. Foreman and gentlemen of the jury; we will adjourn now for lunch, and please return here at two-thirty o'clock P.M. Permit no one to speak to you, or speak of the case in your presence. Keep an open mind.

(The jury retires for luncheon recess.)

[fol. 82] The Court: The defendants are remanded.

(Whereupon a luncheon recess was taken to two-thirty o'clock P. M.)

(Afternoon Session: 2:30 p. m.)

(The jury returned; the roll was called, the trial resumed.)

The Court: Judge Solovei, will you step up, please?

Mr. Solovei: Yes, sir.

(Conference at the bench.)

COLLOQUY

The Court: We will adjourn at a quarter to four today. Judge Solovei wants to leave at a quarter to four.

Mr. Schor: May I have the permission of the Court to recall Detective Kaile for one question?

The Court: Yes.

Mr. Schor: Detective Kaile.

The Court: What was the name of the cab driver?

Mr. Schor: Willie Dinkins.

The Court: Is he still in the building?

Mr. Schor: No, sir.

The Court: All right.

[fol. 83] Detective JOHN KAILE, recalled to the stand having been previously sworn, further testified as follows:

Direct Examination by Mr. Schor:

Q. Detective Kaile, I want to clear up one matter. When Judge Healy was asking you questions with respect to the time of your questioning defendant Jackson at Cumberland Hospital, whether it was before the operation or after the operation, I wasn't quite clear what your answer was.

Let me put the question very plainly. Your testimony was that you had a conversation with the defendant Jackson for the first time at the hospital at about 2:00 a.m., is that correct? A. That's correct, sir.

Q. Then you had another conversation with him about twenty minutes later, is that correct? A. That's correct.

Q. Now, were these two conversations before Jackson was operated upon or after he was operated upon? A. They were before.

Mr. Schor: Thank you very much.

Cross Examination by Mr. Healy:

Q. During the luncheon recess, you had a conference with the district attorney, did you, about this testimony? A. I did.

Q. And he refreshed your recollection as to what you had said on the stand this morning, is that right? A. That's correct.

Q. He told you he wanted to ask you some more questions now this afternoon; correct? A. That's correct.

[fol. 84] Q. Were you present when the defendant was operated on? A. I was not present when the defendant was operated on.

Q. So your testimony that you are giving here is as to what somebody else told you, is that right? You don't know when he was operated on, do you? A. I don't know. I know that he was operated on, because I saw—

Q. Somebody told you that? A. No, sir. I saw the hospital records.

Q. I mean, you are giving this testimony from something you have heard or something you have read, is that right? A. Something I read.

Mr. Healy: I move to strike the testimony from the record.

The Court: Motion is denied.

Mr. Healy: I respectfully except.

The Court: You got to the scene about 1:30, is that correct?

The Witness: To the scene, that's right.

The Court: Yes. And the incident was already completed; is that correct?

The Witness: That's correct.

The Court: Then you went directly to the hospital?

The Witness: That's correct.

The Court: Cumberland Street Hospital?

The Witness: That's right.

The Court: And that's when you saw Jackson?

The Witness: That's when I saw Jackson.

The Court: That was about 2:00 a.m., you say?

The Witness: That's correct.

[fol. 85] *By Mr. Healy:*

Q. Where are those hospital records now, do you know? A. They should be at the Cumberland Hospital.

Q. When did you look at them last? A. I last saw them on September 22nd.

Q. I ask you—

Mr. Healy: If the Court please, I ask that I be permitted to see those records even by subpoena by the district attorney.

The Court: Produce the records. I don't know whether I am going to let him have it. You produce them.

Mr. Schor: I will subpoena the records. They have not been subpoenaed, but I will do that, sir.

Mr. Healy: Thank you, Judge.

The Court: You bring them to the Court.

Mr. Schor: Yes, sir.

Mr. Healy: Tomorrow will be all right.

The Court: Then I will make the decision if he asks me to let him have them.

Mr. Healy: Thank you, your Honor. That's all.

Mr. Schor: Thank you.

(Witness excused.)

* * * *

[fol. 86] Brooklyn, New York
October 5th, 1960

(The jurors returned, the roll was called, and the trial was resumed.)

Mr. Schor: Yesterday, your Honor asked me to secure the hospital record of the Cumberland Hospital, pertaining to the defendant Jackson. I have that here.

The Court: Show it to Judge Healy.

(Mr. Schor handed the paper to Mr. Healy.)

The Court: Call your next witness.

Mr. Schor: Mr. Lentini, please.

VITO LENTINI, Room 409, Municipal Building, Brooklyn, New York, called as a witness for the People, being duly sworn by the Clerk, testified as follows:

Direct Examination by Mr. Schor:

Q. What is your occupation, Mr. Lentini? A. Hearing Reporter, Sir.

Q. By hearing reporter, you mean you are employed by whom. A. I am employed by the District Attorney of Kings County, in Brooklyn.

Q. And what is a hearing reporter? A. Well, a stenographer.

Q. Do you use the Stenotype machine? A. Yes, I do.

Q. What are your duties as a stenographer or hearing reporter? A. My duties?

Q. Yes. A. To record verbatim statements that are given to Assistant D. A.'s, and answers that are given [fol. 87] to the Assistant D. A.; questions and answers recorded verbatim.

Q. Am I correct when I say that you respond to the various police stations throughout the Borough of Brooklyn, and various hospitals and other places, and you always are accompanied by an assistant district attorney? Is that correct? A. That is correct.

Q. And the Assistant District Attorney questions witnesses, prospective defendants, prisoners, and you take down the questions and the answers on your Stenotype machine, is that correct? A. That is right.

Q. Now did you go on June 14th, 1960, with Assistant District Attorney Postal to the Cumberland Hospital? A. Yes, I did.

Q. And did you go to Ward 26 of that hospital? A. Yes, I did.

Q. And sometime during that morning, did Mr. Postal question a man named Nathan Jackson? A. Yes, he did.

Q. And did you take down on your Stenotype machine the questions that Mr. Postal asked Nathan Jackson? A. Yes.

Q. And did you take down on this machine the answers that Jackson made to these questions? A. I did; yes.

Q. Now subsequent to that, after that, did you at your leisure, transcribe your Stenotype notes to typewritten form? A. I transcribed them; yes.

Q. And did you compare the transcription with your original Stenotype notes? A. I did.

Q. Was your transcription an accurate one? A. Yes, it was.

[fol. 88] Q. I show you several sheets, five sheets, five pieces of typewritten matter, and ask you whether this is the transcription of your Stenotype notes? A. Yes, it is.

The Court: Mark it for identification.

(Marked Peoples Exhibit 14 for Identification.)

By Mr. Schor:

Q. Did you compare Peoples Exhibit 14 for Identification with your original notes? A. Yes, sir, I did.

Q. Is that an accurate transcription of the questions put by Mr. Postal and the answers made by the defendant Nathan Jackson? A. It is, Sir.

The Court: Consider the original notes marked Peoples Exhibit 14-A for Identification.

Mr. Schor: I offer it in evidence.

The Court: One thing at one time. Those are your original notes in your hand now?

The Witness: Yes, sir.

Mr. Schor: We are a little confused, I think. At least, I am. Did your Honor ask about the original notes?

The Court: Yes, they are considered marked 14-A.

Mr. Schor: And the transcription is Peoples Exhibit 14?

The Court: Yes, 14 for Identification. Now, you offer them in evidence, with respect to the defendant Jackson? [fol. 89] Mr. Schor: That is correct, Sir.

The Court: Any objection?

Mr. Healy: No.

Mr. Solovei: Objection by Nora Elliott.

The Court: Mark in it evidence, with the same instruction, gentlemen of the jury, as I said before, subsequent to the completion of a crime, the speech of one is to be considered only as against him, and not as against the other defendant. Mark it.

(Received and marked Peoples Exhibit 14.)

The Court: Let me have the exhibit, please.

(Exhibit was handed to the Court.)

The Court: Do you have a copy of this statement, Judge Healy?

Mr. Healy: Yes, I have a copy.

The Court: Return this to the District Attorney. You may proceed.

By Mr. Schor:

Q. With the Court's permission, at this time, I would like to read this statement to the jury, and ask the witness to follow me with his original notes.

The Court: Yes.

Mr. Schor: Mr. Witness, and you correct me if I make a mistake in reading from this statement. Will you do [fol. 90] that please, Mr. Lentini?

The Witness: Yes, sir.

Mr. Schor: Statement No. 1056; Folio Number 86; statement taken at the Cumberland Hospital, Brooklyn, N. Y. on June 14, 1960; commencing at about 3:55 A. M. By Assistant District Attorney Saul Postal; Vito Lentini, Hearing Reporter:

Nathan Jackson questioned by Mr. Postal:

"Q. What is your name? A. Nathan Jackson.

"Q. Where do you live? A. 446 Classon Avenue.

"Q. How old are you? A. I will be 25.

"Q. This morning did you go to the I. C. U. Hotel at 1124 Fulton Street? A. No.

"Q. Didn't you go there with a young lady named Nora something? A. This morning I didn't—yeah.

"Q. Why did you go there for, Nathan? A. To get a room.

"Q. Did you also go there to do a stickup? A. No.

"Q. After you got there, did you decide to stick up the hotel? A. Yeah, when the woman recognized me.

"Q. What is the name of the girl that went to the hotel with you? A. Nora.

"Q. Did she know you were going to do a stickup? A. No.

"Q. Did you have a gun with you? A. Yes.

[fol. 91] "Q. What kind of a gun was it? A. .22; nine shot.

"Q. Did you speak to the woman Clerk? A. Yes.

"Q. Did you decide after she recognized you that you were going to rob her? A. Yes.

"Q. What did you say to her? A. I told her, 'It is a stickup.'

"Q. What did you do with the gun? A. I put it in my pocket.

"Q. Did you point the gun at her? A. Yeah.

"Q. Did you ask her for the money? A. Yeah.

"Q. How much money did she give you? A. I don't know.

"Q. Where did she take it from? A. Out of her pocket.

"Q. Where was Nora while this was going on? A. She had run out.

"Q. You told her to go out? A. Run out.

"Q. After you got the money from this woman— A. Look, I can't go on.

"Q. After you got the money from this woman did you tell everybody to go upstairs? A. Yeah.

"Q. Where did you tell them to stay? A. In the room

"Q. Did you lock the door? A. I didn't see them lock it.

"Q. Did you then go downstairs and see Nora? A. Yes, she came back there.

"Q. She came back upstairs to where you were? A. Not back up. She came out.

[fol. 92] "Q. When you got to the lobby, did you and Nora start to go out of the door? A. No.

"Q. What did you do? Did you get out of the door before the officer came in? A. Yeah.

"Q. Where did you meet the officer? A. On the street.

"Q. What happened when you met him? A. I said, 'There was a fight upstairs.'

"Q. Then what? A. He insisted I go with him so I got the best of him.

"Q. How did you get the best of him? A. I know Judo.

"Q. You threw him over? A. Yeah.

"Q. Where was your gun while you were giving him the Judo? A. In my holster.

"Q. After you threw him to the ground, did you pull your gun? Where was the holster? A. On my shoulder.

"Q. After you threw him to the ground, what did you do about your gun? A. He went for his gun.

"Q. What did you do? A. I got mine out first.

"Q. Did you point the gun at him. A. Yeah.

"Q. What did you say to him? A. Told him not to be a hero.

"Q. Where was Nora at this time? A. Right there then.

"Q. After you flung the cop to the ground, did he drop his club? A. I don't know.

[fol. 93] "Q. Do you remember Nora picking up his club and hitting him with it? A. No.

"Q. Was she nearby while this was going on? A. She was screaming; that is all.

"Q. How many shots did you fire at the officer? A. I don't know.

"Q. Was it more than one? A. Yeah.

"Q. Who fired first, you or the police officer? A. I beat him to it.

"Q. How many times did you fire at him? A. I don't know; twice probably.

"Q. Did he go down? Did he fall down? A. Yeah.

"Q. What did you do? A. I shot. I didn't know. I knew I was shot. While I was on the ground he fired the gun.

"Q. After the shots were fired, what did you do? A. I got in the cab.

"Q. Where did you go? A. I told the cabbie to bring me here."

The Court: I charge the jury that whatever he said about the co-defendant Nora is not to be considered against her.

Mr. Schor: That is the People's case.

The Court: The People rest?

Mr. Healy: I want to ask some questions.

The Court: Withdraw your statement that you rest.

Mr. Schor: I will withdraw the statement that I rest my case at this time.

Mr. Healy: Just a couple of questions.

The Court: Yes.

[fol. 94] *Cross Examination by Mr. Healy:*

Q. Mr. Lentini, from the caption of the statement that I have in my hand, it indicates that the questioning started at about 3:55 A. M., is that correct? A. That is correct.

Q. And that it continued and concluded at four A. M., is that right? A. That is right.

Q. The five minutes period was taken up by the questions and answers that were being propounded? A. That is right.

Q. Now was there any interval between the time those questions were asked and those answers were made as they are indicated on this exhibit? A. Any interval?

Q. Yes, was there any stop; any time between the questions, or did they continue one right after the other? A. They continued one right after the other.

Q. I notice on Page 2, which I have here, there is the following question and the following answer, about two questions from the bottom: "Q. After you got the money from that woman"—and the defendant answered, "Look, I can't go on." That question was asked, and the answer given, according to your record, is that right? A. Yes.

Q. After the defendant said, "Look, I can't go on," did the questioning continue, or did Mr. Postal stop? A. He continued. He repeated the question.

Q. He kept right on with no stop? A. He kept right on; that is right.

Q. This was in the hospital where this statement was taken, is that correct? A. That is right.

[fol. 95] Q. In what part of the hospital? A. In the ward.

Q. I presume you were sitting on a chair, were you? A. I was standing up at the time.

Q. Standing up? A. Yes.

Q. And you had your machine— A. On a little movable table.

Q. Resting on the table? A. That is right.

Q. And was Mr. Postal standing up also? A. That is right.

Q. While he was propounding these questions to the defendant, is that right? A. Yes.

Q. Were there other people around the bed other than the defendant, and you and Mr. Postal? A. Yes, there were.

Q. There were several other people around the bed? A. That is right.

Q. About how many in all? A. I would say about approximately seven or eight.

Q. Were they police officers? A. There were police officers present.

Q. Any doctors there, or men in white? A. There were hospital personnel working.

Q. They were in the room also with the police officers? A. Yes.

Q. Where was the defendant? A. In bed.

Q. Lying down in bed? A. That is right.

Q. Was lying down in bed while Mr. Postal was standing up asking him questions? A. Yes.

Q. In the bed? A. Yes.

Q. He made these replies to you while he was in the bed, is that right? A. Yes.

Mr. Healy: That is all.

Mr. Solovei: One question.

The Court: Yes.

* * * *

[fol. 96] NATHAN JACKSON (Defendant) residing at No. 446 Classon Avenue, Brooklyn, New York, called as a witness in his own behalf, being duly sworn by the Clerk, testified as follows:

Direct Examination by Mr. Healy:

Q. Mr. Jackson, look over towards me now and try to speak intelligently and clearly as you can so all the jurors and I can hear you. How old are you, Mr. Jackson? A. I am twenty-five.

Q. Are you married or are you single? A. Single.

Q. Where were you born? A. Houston, Texas.

Q. How long have you been living up here in Brooklyn? A. Since 1950: July.

Q. Now before your arrest, were you working? A. Yes, I was.

[fol. 97] Q. Where? A. I worked at the Brooklyn Hospital.

Q. At the Brooklyn Hospital? A. Yes.

Q. Doing what? A. I was a clerk in the laundry.

Q. A Clerk in the laundry? A. Yes.

Q. Now, if we may get right down to this day in question, when you were arrested. Do you remember going into that hotel, the I. C. U. hotel, at 1124 Fulton Street, that day? A. Yes, I do.

Q. And with whom did you enter the hotel? A. With Miss Nora Elliott.

Q. What time did you meet Miss Elliott that day, do you remember? A. Yes, I met her on several occasions. The last time was something to one.

Q. I beg your pardon? A. Something to one o'clock; about a quarter to one.

Q. One o'clock in the morning? A. Yes, sir.

Q. Had you been with her the night before at certain places? A. Yes.

Q. Where were they? A. We went up to Central Park, 42nd Street, and to some night club up there.

Q. What I am interested to know is this; had you been drinking that night? A. Oh, yes, we had been drinking.

Q. With her? A. Yes.

Q. What time did you start drinking, would you say? A. Well, I would say about seven-thirty.

Q. That night? A. Yes.

Q. Had you been drinking the day before, before you met her?

Mr. Schor: I object to that as a leading question.

[fol. 98] The Court: Objection sustained.

Mr. Healy: All right.

The Court: Proceed.

By Mr. Healy:

Q. What I am interested to know is this; when you went up to the hotel—

The Court: Excuse me, you said the day before?

Mr. Healy: Yes.

The Court: Do you mean before twelve o'clock?

Mr. Healy: That is right.

The Court: Then please put it that way.
Mr. Healy: Yes.
The Court: I thought you meant the day before.
Mr. Healy: No, I did not.
The Court: Proceed.

By Mr. Healy:

Q. You told us about your drinking from seven o'clock the night before to early morning, and the places you had been to, and before seven o'clock that same night had you been drinking yourself? A. Oh, yes, I had, with my brother.

Q. What were you drinking? A. Whiskey.

Q. Whiskey? A. Yes.

Q. How many drinks would you say you had approximately? A. Well, about—that is difficult to say, but between my brother and I, we drank a fifth of whiskey.

Q. Before you went into the hotel with Nora, did you [fol. 99] talk to Nora about what you were going in there for; just yes or no? A. No.

Q. Well, would you tell us now when you originally entered that hotel, what did you go in there for? A. To get a room.

Q. Were you tired? A. Yes, very.

Q. From your drinking? A. Yes.

Q. And from being out? A. Yes, sir.

Q. Was that it, and you wanted to go to bed, do I understand? A. That is right.

The Court: Please do not lead.

Mr. Healy: I won't lead him any more. I must apologize to the Court.

The Court: Proceed.

By Mr. Healy:

Q. Now, in your own words, I want you to tell me, without my offering any suggestion to you, tell us what happened when you went into that hotel with Nora? Talk up loud, and keep your voice up. A. When we reached the second floor, the first flight from the street, Miss Elliott went to sign the card, the register. I stayed in the alcove. Mrs. McGibbon, the lady that on that night told Miss Elliott—

Mr. Schor: I don't understand what he is saying.

The Witness: Mrs. McGibbon, the manager of the hotel, told Miss Elliott that it was I who was supposed to have signed the card. I told Mrs. McGibbon it is all right if she signed it.

The Court: Please keep your voice up.

[fol. 100] The Witness: Well, I was sitting in the alcove with my head in my hand, and the lady asked me what was wrong, the manager of the hotel.

Mr. Healy: I can't hear you.

The Court: He said, "The lady asked me what was wrong, the manager of the hotel." Speak up loud.

The Witness: I told her nothing was wrong, I was just tired. When I raised my head, she looked into my face, and for some cause or another, she was frightened, and ran back towards the office, and called to some gentleman, whose name I don't know, and said; "A stickup man; it is a stickup man." Miss Elliott was facing me, going towards the back, and I told her to get out. I had to repeat this twice because she did not like know the cause of my telling her to get out, and frightened, and probably confused, she left.

The Court: Who is she? There are two ladies here. Mention the name.

The Witness: Miss Elliott. When I heard her disappear from the level of the flight I was standing on.

Mr. Healy: I cannot hear that.

The Court: Listen, Mister, you must speak up so that your lawyer can hear you. The way you have been speaking, he says he can't hear you. You want the jury to hear your story, isn't that true?

The Witness: Of course.

The Court: You speak to Judge Healy good and loud the way I am. Make a real effort.

[fol. 101] The Witness: Yes.

Mr. Healy: May I respectfully make the suggestion that the microphone there is causing the difficulty. Let us try it without the microphone.

The Court: We have been doing it without the microphone. Speak up good and loud now.

The Witness: I shouted to Miss Elliott to leave the hotel. I had to repeat it twice before she moved because she did not know my reasons for telling her to leave. When her head disappeared below the level of the floor on which I was standing, it was then that I pulled the revolver out.

Mr. Schor: I did not hear that.

The Court: It was then that he said he pulled the revolver out.

Mr. Healy: Talk up good and loud.

The Witness: A gentleman in the hotel—

The Court: Louder.

The Witness: The gentleman in the hotel was standing in the doorway. He appeared to be aggressive. He intended, I suppose,—

The Court: That is not satisfactory. I cannot hear you. Do not let me tell you to speak loud again because I think you do understand me. The word "loud" means good and loud.

The Witness: I am not accustomed to speaking that way.

The Court: You will have to speak loud even though you are not accustomed to it. I do not speak loud either, but I want this jury to hear you, and I know you want the jury to hear you, and if you mumble, they will not [fol. 102] hear you. Please make a real effort to speak loud.

The Witness: The gentleman was standing in the doorway. He appeared to have been aggressive. He was coming toward me. It was then that I pulled the revolver. I looked at them both, and backed them into the office. The lady, Mrs. McGibbon, reached into her pocket and threw some money on the counter, on the desk. She was not asked for it, but she assumed that it was a stickup, and she did.

Mr. Schor: I move to strike that out, what she assumed.

The Court: Overruled.

The Witness: She assumed that it was a stickup, and she threw—she reached into her pocket and threw a wad of bills on the desk. The bell rang downstairs, and I permitted Mrs. McGibbon to buzz the door so she can open

the door. It was a lady and a gentleman. They came in and I was standing at the door. I had the gun in my hand, pointed down toward the floor. They saw it, and I told them to sit down with the rest. Minutes later, another couple came from upstairs. Again I was standing in the door, and they too saw the gun in my hand. I told them to sit with the rest. Some minutes passed, and then I asked the gentleman in the office to look out the window to see if there was a policeman standing out there. He did, and said there was a policeman standing there in the street, talking to a cab driver. I asked the gentleman then was there a vacant room, and he said there was one [fol. 103] at the top floor front. He led them up into the front room, and he locked the door behind them. When I came down the steps and got to the front door, Mrs. Elliott, who I thought had gone home, approached me coming from the westerly direction on Fulton Street. She was crying hysterically. The patrolman noticed that and came over, and asked what was wrong with the lady. I told him nothing serious, we only had a quarrel. He asked me had there been trouble upstairs, and I told him, "No, nothing serious." He insisted I go with him. We talked for a while and I told him that the lady was not feeling well, and she was only recently out of the hospital, explaining that she was hysterical with the stuff that was in her. He reflected. He gave me permission to have her go home. I reached my hand in my pocket and gave her a couple of bills, and said I would see her later. She walked down Fulton Street in a westerly direction, and the patrolman rang the bell in the hotel, and no one answered. After he rang a few times, some glass fell into the street, and then he said, "Now, I am convinced that there was a fight upstairs." He tried to knock on the door, that is, the second door into the vestibule. He tried unsuccessfully, and he asked me to open it for him. Together we knocked on the door. He ran up the steps, ahead of me, and instead of following him, I ran down the street. He ran back down the stoop and followed me [fol. 104] down the street and grabbed me by the arm. We started struggling. I did not throw him. He fell into the street. When he fell into the street, he reached for

his revolver. It was very dark. It was a nickle-plated revolver, and the light reflected upon it. I got mine out first. Seeing that I was about to shoot, he continued to pull it out. He fired one shot. I hit against the car, and tried to do what occurred to me the proper thing under the circumstances, and that was to fall, but I instead I fell against the car. I heard some one scream, "Don't kill him. Please don't kill him." Soon after a second shot was heard. I saw the flame on the first shot. There was screaming, and I remember my finger tightening twice on my own trigger, and then there was a third explosion. Whether this came from my gun or his, I don't know. It was black and dark, and I could not hardly see that. I turned around and ran down Fulton Street in a westerly direction, expecting to be shot in the back any minute. I did not know that the patrolman had been shot, being that I could not see the patrolman. Somehow, on Fulton Street, I managed to get a cab. How I got in the cab or exactly where I got the cab, I don't know. I don't remember. I asked the driver to carry me back to the Cumberland Street Hospital. When I got out of the cab—

Mr. Healy: I cannot hear him.

The Witness: So when I got out of the cab, a patrolman approached the cab with a gun in his hand, and [fol. 105] told me to get out of the cab, and they carried me into the hospital.

The Court: Proceed.

A. I was taken to the hospital and placed on a table, in ward 46. They took me to ward 46, I believe.

The Court: Louder.

A. There was one patrolman there, to my knowledge, and soon others came from the precinct. Altogether, there must have been about seven, the last I remember. Whether they're from the District Attorney's office or from the precinct, I don't know. They were just men.

I told them that I was hurt and that I was gasping for breath. Breathing was becoming very difficult and I couldn't talk very long.

They insisted, telling me if I wanted some water, I must answer their questions. They gave me some water once. They asked me my name. I gave it to them. I told

them I wanted some more water. They said I couldn't have any more water until I answered their questions the way they wanted me to answer them.

This went on for some time. This was while the attendants were pulling off my clothes.

A detective then came in; a new detective. He asked me several questions too. The questions I don't remember, and the answers I gave him I don't remember. I might have said anything. I don't recall what I said really.

By Mr. Healy:

Q. Now, you heard the gentleman here this morning; the stenographer— A. Yes, I did.

[fol. 106] Q. —read some questions and answers?— A. Yes, I did.

Q. —that were put to you? Do you remember making any of those answers to the questions in that hospital? A. I remember questions, and I remembers answers, but what the questions and answers were, I don't remember. I know someone was asking me questions, and to get rid of them, just to be left alone, I did give some answers. But exactly what they were, I couldn't say. They told me if I wanted to be left alone, that I had to give them the answers that they wanted to hear.

Q. All right. Now, you admit that you went into that hotel to rob it. That's right, isn't it? A. Yes, I do.

Q. And you robbed it; right? A. Yes, I did.

Q. Did you intend to kill that policeman? A. No, I didn't.

Q. Was this robbery all over when you came out of that hotel before you met that policeman on the street? A. Yes. The officer knew nothing of the robbery.

Mr. Healy: Will Your Honor bear with me just one moment?

The Court: Yes.

(Mr. Healy conferred with the other defense counsel.)

Mr. Healy: I think that's all, Judge.

The Court: All right. Mr. Solovei, do you wish to cross-examine?

Mr. Solovei: I thought the procedure would be, if it met with Your Honor's permission, that the District Attorney—

[fol. 107] The Court: No.

Mr. Solovei: —examine this witness at this time.

The Court: No. The correct procedure if you wish, you cross-examine. You don't have to. The choice is strictly with you. It won't be held against you if you don't.

Mr. Solovei: I know, but I want to make this observation, Your Honor, for the purposes of the record. I respectfully request that the District Attorney examine, and I examine when he is through.

The Court: Denied.

Mr. Solovei: I except.

Mr. Healy: I have just one more question that I forgot to ask. Will Your Honor forgive me.

The Court: Yes.

By Mr. Healy:

Q. In this statement here, there is some word you used; "judo". A. Yes.

Q. Do you know anything about judo? A. I know nothing of judo.

Q. Did you ever practice judo? A. No; not at any time.

Mr. Healy: All right. That's all.

The Court: All right, Mr. Solovei. I will give you a chance until 2:00 o'clock. We will adjourn now and we will resume at 2:00 o'clock today, instead of adjourning at 1:00 and resuming at 2:30.

Mr. Foreman, gentlemen of the jury: go to lunch. Please do not discuss the case, form or express an opinion [fol. 108] as to the guilt or innocence of the defendants. Keep an open mind. Permit no one to talk to you about it.

(Whereupon, at 12:30 P.M., a luncheon recess was taken until 2:00 o'clock P.M.)

(Afternoon Session: 2:00 a.m.)

(Jury returned; roll called; trial resumed.)

The Court: Proceed, Mr. Solovei.

NATHAN JACKSON, resumed the stand, having been previously sworn, further testified as follows:

Cross Examination by Mr. Solovei:

Q. Mr. Jackson, you told your attorney this morning that you and the defendant Nora Elliott went to the I.C.U. Hotel sometime the morning of June 14, 1960. That's correct, isn't it? A. Yes, sir.

Q. And you told us here this morning that you went there to get a room, is that correct? A. That's correct.

Q. When you got to this hotel that night or morning, Nora Elliott registered, is that right? A. She did.

Q. You told her to register, is that right? A. I did.

[fol. 109] Q. As a matter of fact, you told her to write Mr. and Mrs. Nora Elliott, is that right? A. I don't remember the details, but I did tell her to register.

Q. You went there to rent a bedroom, is that right? A. That's right.

Q. You intended to sleep there, is that right? A. That's right.

Q. Now, at any time while in that place or prior thereto did you tell this defendant Nora Elliott that you were going to stick up or hold up this place, the I.C.U. Hotel? A. Of course not.

Q. Did you ever have any such talk with her of any kind by the widest stretch of the imagination; yes or no? A. No, definitely not.

Q. When you got to this hotel, and you told us here that you recognized somebody in the hotel, is that right? A. I did.

Q. When you recognized this "somebody" in the hotel, did you immediately tell Nora Elliott to leave the premises? A. I did.

Q. Did she leave the premises? A. She did.

Q. You saw her going out? A. I saw her going out.

Q. Now, after she left the premises, you on your own initiative decided to hold this place up, is that correct? A. I did.

Q. And she had nothing at all to do with it, isn't that right? A. Nothing.

Q. And prior thereto you never told her anything about it, isn't that correct? A. That's correct.

Q. I believe you told us that when you went to the premises, you had a revolver in your holster, isn't that correct? A. I did.

Q. Did you ever tell Nora Elliott that you had a re- [fol. 110] volver on your person that night or that morning? A. No, sir, she didn't know I had it on.

Q. She did not know you had one? A. That's right.

Q. And you never showed it to her, did you? A. Never.

Q. After you held the place up, you went downstairs, is that correct? A. I did.

Q. To the street, is that right? A. Yes.

Q. And you saw Nora Elliott there, is that correct? A. Yes, I did.

Q. While Nora Elliott was in the street, then later on you met a cop, is that correct? A. I did.

Q. And this was the cop, this man Ramos that was later on shot and killed, isn't that correct? A. That's correct.

Q. Now, there was a time when you and the cop were struggling in the street, is that correct? A. Yes, sir.

Q. While you and the cop were struggling in the street, did you at any time see Nora Elliott strike the cop on the head; yes or no, with a club or anything? A. No, I did not.

Q. You were in a position to see if such a thing took place, weren't you? A. Of course.

Q. And you would know if such a thing did take place, if it actually did happen, is that correct? A. Yes, sir.

Q. Because it was you and the cop who were struggling, together, is that correct? A. Yes.

Q. Did you at any time hear Nora Elliott say to you, "Kill him, kill him"? A. No, I didn't.

Q. Did she ever say anything like that? A. No, she did not.

Q. Whatever you did, you did on your own initiative, is that correct? A. That's correct.

[fol. 111] Q. Now, while you and the cop were struggling, where was Nora Elliott? A. She was on the sidewalk.

Q. What was she doing? A. She was screaming.

Q. Screaming and crying, is that right? A. That's right.

Q. Isn't it a fact that you got downstairs, you never told Nora Elliott anything about any stickup or anything you did upstairs, isn't that right? A. Yes, sir.

Q. And when you got downstairs, and she was on the sidewalk, and you met her down there, she knew nothing at all about what you did upstairs, isn't that correct? A. That's correct.

Mr Solovei: That's all I have of this witness.

The Court: Cross examination, Mr. Schor, if you wish.

Cross Examination by Mr. Schor:

Q. How long did you know Nora Elliott that night?

Mr. Solovei: I can't hear you.

The Court: Mr. Schor, I think it is better if you stood away. Speak up loud so the witness will speak up loud.

Mr. Schor: I'll speak up loud.

Q. How long did you know her? A. Since September last year.

Q. When did you meet her on June 13th; what time? A. Well, I saw her on several occasions. I first saw her that morning about 10:00 a.m.

[fol. 112] Q. Ten o'clock in the morning, June 13th? A. Yes.

Q. Is that right? A. Yes, sir, that's right.

The Court: Do you remember when?

The Witness: 10:00 a.m., June 13th.

By Mr. Schor:

Q. Where? A. In the corridor of the apartment house were we lived.

Q. Where is that? A. 446 Classon Avenue.

Q. Did she live with you? A. No, she did not.

Q. She lived in the same apartment house? A. In the same apartment house.

Q. What floor did you live on? A. The second floor front.

Q. What floor did Nora live on? A. Top floor rear.

Q. Alone? A. Alone.

Q. How long did you stay with her? A. I don't understand the question.

Q. How long did you stay with her from ten o'clock in the morning? A. I only met her in the corridor. I spoke with her first.

Q. How long did you talk with her? A. Approximately five minutes; approximately five minutes.

Q. Where did you go from there? A. I was on my way out.

Q. Where did you go? A. To a friend's house.

Q. Who is the friend? A. Richard Strawther.

Q. Where does he live? A. 168 Madison Street.

Q. 168 Madison Street? A. Yes.

Q. How do you spell his name? A. S-t-r-a-w-t-h-e-r. [fol. 113] Q. What apartment? A. I don't know the apartment number.

Q. What floor? A. Second floor.

Q. What? A. Second floor front.

Q. Did you see him? A. No, I didn't.

Q. Was there anybody at home in his apartment? A. His wife was there.

Q. You talked to his wife? A. I did.

Q. How long did you stay there? A. I didn't enter. I talked to her from the window.

Q. I don't understand you, Mr. Jackson. A. She came to the window when I ring the bell. I talked to her from the sidewalk.

Q. How long did you talk to her? A. Approximately five minutes; five or ten minutes; I don't remember.

Q. Where did you go from there? A. Back to the house.

Q. Back to your house? A. Yes, I did.

Q. Did you go into your apartment? A. My own apartment.

Q. Were you alone? A. No, my brother was there.

Q. What did you do there? A. Well, I read for a while. Then we talked and drinked.

Q. What is your brother's name? A. Carl.

Q. How long were you drinking? A. Oh, a few hours. I don't know exactly.

Q. Continually drinking with your brother? A. No. I was studying. I was reading and I was talking to my brother at the same time, and I was drinking.

Q. Well, did you and your brother start a fresh bottle or was the bottle already opened and some whisky taken out of it before you started to drink with your brother? A. No, it was a fresh bottle.

[fol. 114] Q. A fresh bottle? A. Yes.

Q. You bought it? A. I bought it.

Q. And it was a "fifth" of whisky, right? A. Yes, it was.

Q. And you and your brother finished the bottle? A. We did.

Q. Right? A. Yes.

Q. What time did you finish the bottle? A. I don't remember. I don't remember.

Q. Well, try to give us, to the best of your recollection, about what time it was? A. I would say about three.

Q. Three o'clock in the afternoon? A. Yes.

Q. Where did you go from there? A. I didn't.

Q. You stayed home? A. I stayed home.

Q. Well, what time did you leave your apartment? A. It was about seven, or 7:30; I don't remember.

Q. You were studying up to seven o'clock? A. Yes, I was.

Q. What were you studying, Mr. Jackson? A. Social science, philosophy.

Q. Social sciences? A. Yes.

Q. Are you interested in social science? A. Yes, I am.

Q. Were you just reading or were you making notes of what you were reading? A. I very seldom take notes. I was just reading.

Q. Just reading? A. Yes.

Q. And did the subject, the social science that you were reading, interest you at that time, up to seven o'clock? A. Yes, it did.

Q. Were you reading more than one book or did you refer to other books? A. I was reading. I was talking to my brother. We were discussing—

[fol. 115] Q. You don't understand my question evidently, Mr. Jackson. I am trying to find out whether you were studying from one book or did you have two or three books that you were reading the subject that you were interested in? A. I was reading particularly the book, the History of Western Philosophy.

Q. The history of what? A. Of Western Philosophy.

Q. Of Western Philosophy? A. Yes.

Q. Is that one volume? A. One volume.

Q. Do you know who the author of that book is? A. Will Durant.

Q. Will Durant? A. Yes.

Q. There is no question about it now, you were reading that book? A. I was reading that book.

Q. Now, at seven o'clock did you finish reading that book. A. I didn't finish.

Q. You didn't finish but you put the book down? A. I did.

Q. You left the apartment? A. Yes, I went upstairs.

Q. You went where? A. Upstairs.

Q. Upstairs? A. Yes.

Q. To Nora's apartment? A. Yes.

Q. What did you do in Nora's apartment? A. We went out.

Q. You went out, you and Nora went out? A. Yes.

Q. Where did you go? A. Back to my friend's house.

Q. Which friend? A. Richard Strawther.

Q. Was he home this time? A. He was home.

Q. This time he was home? A. Yes.

The Court: Keep your voice up. It is very difficult to hear you, Mister.

[fol. 116] Q. What time did you get to his house with Nora? A. I don't remember the exact time. It must have been something after seven.

Q. After seven? A. Yes.

Q. How far away did you live from your friend's house, about how many blocks? A. About four blocks.

Q. How long did you stay at your friend's house with Nora? A. For some time; maybe nine o'clock.

Q. Did you go somewheres? A. Yes, we did.

Q. Who is "we"? A. Richard Strawther, his wife, Nora and I.

Q. Where did you go? A. New York City.

Q. Where? A. 42nd Street.

Q. 42nd Street is a long street, running from one river to the other. Can you tell us more precisely where on 42nd Street you went? A. We stopped at the shooting gallery, and a few other places, I don't remember.

Q. Shooting gallery on 42nd Street? A. Yes.

Q. Near where; near what street was that? A. I don't remember. I don't know the city very well.

Q. What were you doing at the shooting gallery? A. We took pictures.

Q. Did you have your gun in your holster at the time? A. I did.

Q. What? A. Yes, I did.

Q. You had your gun in the holster when you left the house before you went to call for Nora Elliott, didn't you? A. I did.

Q. How did you get to New York City? A. By cab.

Q. Did you have the holster and the gun on you in the cab? A. In the cab, yes.

[fol. 117] Q. Did you have the gun on you when you left the house the first time at seven o'clock? A. No, I didn't.

Q. Or ten o'clock? A. I didn't.

Q. When did you first put the gun in the holster and wear it? A. When I first put on the jacket.

Q. When was that? A. Right before I went to call on Miss Elliott.

Q. Well, you called for her twice that day; you went up to see her twice, didn't you? A. No, the first time I met her in the corridor.

The Court: The first time he met her in the vestibule, he said, or corridor.

Mr. Schor: That's right.

Q. This is about seven o'clock, right? A. Yes.

Q. You knew that you were going to call on your girl friend Nora Elliott, didn't you, before you left? A. I did.

Q. You knew that after you called on her, you were going over to your friend's house? A. I did.

Q. And you knew that you would go out to New York City and enjoy yourself, right? A. I didn't.

Q. But, nevertheless, when you left your apartment, you took the gun with you? A. I did.

Q. All right. After you took pictures, at the shooting gallery, what did you do after that? A. Someone suggested that we go to Central Park. We went there.

Q. How did you get to Central Park from 42nd Street? A. By cab.

Q. What time was this? A. I didn't notice the time.

Q. About? A. It was after ten.

[fol. 118] Q. At night? A. Yes.

Q. What part of Central Park did you ride to? A. I am not at all familiar with Central Park. We walked through the park.

Q. Where did you tell the taxi driver to drive you to? A. We got out on the thoroughfare.

Q. Answer my question first.

The Court: He said, "We got out on the thoroughfare." He is not familiar. Give us your best estimate, what part of Central Park you stopped?

The Witness: All I know we was on the Fifth Avenue side. We were on the Fifth Avenue side of the park.

By Mr. Schor:

Q. When you got into the taxicab, after you had taken pictures in the shooting gallery, where did you tell the taxi driver to drive you to? A. To Central Park.

Q. Just Central Park? A. Just Central Park.

Q. So, you got out somewheres on Fifth Avenue, right? A. On the thoroughfare; I say it was on the Fifth Avenue side of the park.

Q. What did you do when you got up there? A. We walked through the park for a while.

Q. You walked through the park? A. Yes, the four of us.

Q. Do you recall that; do you recall walking through the park? A. I do, quite clearly.

Q. Did you sit down on a bench? A. No, we didn't.

Q. Just walked? A. Just walked.

Q. Where did you walk to? A. We walked through [fol. 119] the park. I am not at all familiar with Central Park.

Q. How long did you stay in Central Park? A. Approximately fifteen or twenty minutes.

Q. You didn't walk very far, did you? A. No.

Q. Well, what happened after you walked 15 or 20 minutes? Miss Elliott and I had something of a quarrel.

Q. You had a quarrel with her? A. Yes.

Q. You had words, a spat, is that it? A. Yes.

Q. What happened after that? A. Well, I decided,—I insisted that we go home, back to Brooklyn that is.

Q. Did you go back to Brooklyn then? A. We did.

Q. The four of you? A. The four of us.

Q. How did you get back to Brooklyn? A. By cab.

Q. Did you make any stops between Central Park and Brooklyn? A. No, we didn't.

Q. Didn't get off the cab? A. No.

Q. Didn't go anywheres? A. No.

Q. So, as I understand your testimony, sir, from Brooklyn, after you picked up Nora Elliott and your friend and his wife, you went to 42nd Street? A. We went to 42nd Street.

Q. You went to a shooting gallery? A. Yes.

Q. From there you went to Central Park? A. Central Park.

Q. Right? A. Yes.

Q. And fifteen or twenty minutes after walking in Central Park, you got into a taxicab and came back to Brooklyn, is that right? A. That's right.

Q. You are sure about that? A. I'm positive.

Q. You made no other stops? A. We made no other stops.

[fol. 120] Q. Do you remember only this morning your lawyer asked you,—he asked you this question:

> "Q. had you been with her the night before at certain places?"

And you said, "Yes."

Do you remember that? A. Yes.

Q. And then Judge Healy asked you, where were they; and you said:

"A. We went up to Central Park, 42nd Street, and to some night club up there."

A. I didn't say "some night club up there."

Q. You didn't say "some night club." A. Not up there.

Q. You didn't say "some night club up there"? A. We did go to a night club in Brooklyn.

Q. Mr. Jackson—

The Court: He has answered, he didn't say "up there."

Mr. Schor: Will you concede, Judge Healy, I am reading the answer correctly, sir?

Mr. Healy: Yes.

Mr. Schor: All right.

By Mr. Schor:

Q. When you came back to Brooklyn with the taxicab, where was the first place the cab stopped? A. We got off at Franklin and Fulton.

Q. Where did you go from there? A. To a bar.

Q. A bar? A. Yes.

Q. Did your friends also go, the boy friend and his wife? A. Yes.

[fol. 121] Q. The four of you? A. The four of us.

Q. This bar is right there at Franklin and Fulton? A. No; on Nostrand—Fulton and Bedford.

Q. Fulton and Bedford. What is the name of that bar? A. The Crossroads.

Q. Crossroads? A. Yes.

Q. What happened in the bar? A. Well, there we drank for a while.

Q. You say "we drank for a while." What time did you get there, about? A. I don't remember the time.

Q. Well, about what time? A. I don't remember the time. I couldn't even give you—I'd been drinking, like I say; I don't remember the time. I had no place to go in particular.

Q. Were you there more than—

The Court: Keep your voice up, too, please.

Q. Were you there more than ten minutes? A. Yes, I was there more than ten minutes.

Q. Were you there more than a half hour? A. No, I doubt it.

Q. Less than a half hour? A. Less than a half hour.

Q. Did you stand at the bar or sit down at the table? A. We were sitting at the table.

Q. And you had some drinks? A. Yes.

Q. How many drinks? A. I wouldn't know.

Q. One drink, five drinks, ten drinks? A. You asked me how many drinks did we have—

Q. You. A. I can answer that. I had one.

Q. And then you left the bar? A. We did.

Q. Right? A. Yes, we did.

[fol. 122] Q. Where did you go? A. To the friend's house.

Q. How long did you stay there? A. I don't know. I stayed there longer than Miss Elliott did. She went home.

Q. How long did you stay there? A. Maybe an hour or so; I don't know.

The Court: When did she go home?

The Witness: She left soon after we got there. Again we had another quarrel and she wanted to go home. She left.

By Mr. Schor:

Q. After you left, you don't know what time it was, you say? A. No, it was something to one.

Q. Where did you go from there? A. Home.

Q. Did you go to your apartment? A. Yes.

Q. Did you go to sleep? A. No, I didn't.

Q. What did you do? A. I saw the landlord; I talked with him. He asked us for the place we had. He asked me, my brother, for the place.

Q. You spoke to the landlord, right? A. Yes.

Q. What did you do after you spoke to the landlord? A. I went upstairs to my own place.

Q. What did you do in your own place; went to bed? A. No, I changed clothes.

Q. You changed your clothes? A. Yes, I did.

Q. Well, you changed your clothes; what part of your clothes did you change? A. I changed everything.

Q. Changed your trousers? A. I changed from a gray suit into gray slacks and a black short jacket.

Q. You just changed your jacket and your trousers? [fol. 123] A. I changed everything from a gray suit, which I did have on, to a pair of gray slacks, the one I have on now; and a black sport jacket.

Q. That's what I said; trousers and jacket. A. Everything.

Q. That makes up a suit, right? A. Yes.

Q. You didn't change your shirt? A. Yes, I changed that.

Q. You changed into a shirt? A. Yes.

Q. When you took off the shirt, didn't you have to take the holster off first? A. Of course.

Q. What? A. Of course.

Q. So, when you changed your shirt, you put another shirt on, you put the holster on again with the gun in it, right? A. Yes, I did.

Q. After you changed your clothing, where did you go? A. Upstairs to Miss Elliott's place.

Q. For what purpose, to talk to her? A. Yes, sir; about the quarrel we had.

Q. About the quarrel. So, you took the gun, you changed your clothes, you took a gun with you, to go upstairs, to talk to your girl friend about the quarrel that you had, is that right? A. I had intentions of leaving and going back out when I finished.

The Court: I didn't hear that.

The Witness: I had intentions of leaving the house, and going back out when I finished talking with her.

By Mr. Schor:

Q. You always carry a gun with you? A. Not always.

Q. How long did you have that gun? A. I got it in April.

[fol. 124] Q. 1960? A. 1960.

Q. What time did you go up to Miss Elliott's apartment after you changed your clothing? A. I don't remember. When I went up, she had been packing.

Q. Excuse me for interrupting you. I am sorry. Continue. A. (continuing) When I went up, she was awake.

She had been packing. She had already planned to move. In fact, that Monday morning, when I met her in the corridor, she told me she had been looking for a place. The place was disordered.

Q. The place was— A. Was disordered; she had been packing. I asked her to go back out with me. I suggested she spend the night in a hotel. Like, I say, the room was disordered.

Q. She was living alone in that apartment, wasn't she? A. Yes, sir.

Q. And you didn't want to spend the night with her in her apartment? A. I had no intentions of spending the night with her in any apartment.

Q. You would rather go out to a hotel and rent a room, is that it? A. Originally, I had no intentions of staying there when I left the house. It was on the way to the hotel that she wanted me to stay there with her.

Q. On the way to the hotel you decided you were going to stay at a hotel, is that right? A. Yes, she insisted that I did.

Q. When you left the apartment, with Nora Elliott, you were on your way to the I.C.U. Hotel, weren't you? A. No. I was on my way to the Pleasant Manor Hotel.

Q. Oh, a different hotel? A. Yes.

Q. But you knew you were going to a hotel? A. I was taking her, yes.

[fol. 125] Q. My question to you now, Mr. Jackson is: Why didn't you stay in Nora Elliott's apartment? She lived by herself. Why did you have to take her to any hotel? A. For I had no intentions of staying with Nora Elliott in her room. The room was disordered. I suggested we spend the night in a hotel. I suggested we—

Q. Where is the Plaza Hotel? A. Pleasant Manor; on the corner of Gates Avenue, right off the corner of Classon.

Q. But you didn't go there? A. No, she didn't want to go there.

Q. Who decided on the I.C.U. Hotel? A. She did.

Q. So you went to the I.C.U. Hotel, right? A. That's right; after some argument.

Q. Right from her apartment you went right to the I.C.U. Hotel, is that right? A. That's right.

Q. Did you walk there? A. Yes; very slowly.

Q. What time did you get there? A. I don't know what time. I wasn't watching my watch. Time meant nothing to me. I had no place to go.

Q. How long did it take to walk from your house at 446 Classon Avenue to the I.C.U. Hotel? A. We walked very slowly; we were talking, making future plans. I don't know how long.

Q. Well, near where is 446 Classon Avenue? A. That's approximately six blocks, or eight blocks; it took us maybe,—I don't know, maybe fifteen minutes. We were walking very slowly.

Q. It took you quite a while to get there, didn't it? A. Yes, like I said.

Q. You were just strolling along? A. Just strolling. [fol. 126] Q. Do you remember the weather that night? A. Yes. The weather was fairly good.

Q. Fairly nice? A. Yes.

Q. Clear outside? A. Yes. Clear enough, as I remember.

Q. And you remember that on your way from your house, strolling along, with Nora Elliott, walking towards the I.C.U. Hotel; it took quite a while to get there because of the pace, of the slow pace that you and she were walking; is that correct? A. She walked for a while; we stopped and talked. We walked. We was in no hurry.

Q. That's right. And you were trying to make up, is that right, because of the argument that you had with her earlier that day; is that right? A. No; no.

Q. You were not trying to make up? A. We had made up.

Q. You had already made up? A. Yes.

Q. You were talking about other things? A. Yes.

Q. Were you discussing the book that you had been studying? A. No.

Q. Well, when you got to the hotel, you rang the bell down in the vestibule, didn't you? A. I did.

Q. You had been to that hotel before, weren't you, Mr. Jackson? A. Yes, on several occasions. Sometime in 1952—since 1952.

Q. On these other occasions, did you register? A. I did.

Q. So that when you got to the landing on the floor where the office is, you didn't make the left turn to go to the office; you made the right turn to go to the alcove, isn't that right? A. It is not necessary to make a turn. [fol. 127] The alcove is right at the staircase. You come up to the second landing and the alcove is right there; no need to make a turn.

Q. Don't you have to make a right turn to get in there? A. I don't think I understand you.

Q. Never mind. But the alcove that you did go into is there by the stairs? A. That's right.

Q. Right? A. That's right.

Q. You didn't go into the office down the hallway to register? A. No.

Q. Right? A. No, I didn't.

Q. You went up there as husband and wife; isn't that so? A. I wouldn't know. No one gives his own name in a place of that nature.

Q. When you went there to register before, on other occasions, didn't you write down "Mr. and Mrs. Jackson"? A. No.

Q. You used a fictitious name? A. When I went there on previous occasions; I went there alone.

Q. Alone? A. Yes.

Q. Didn't you have—weren't you living at 446 Classon Avenue? A. You didn't ask me when I went there.

Q. When did you go there? I'll ask you now. A. The first time, in 1952.

Q. 1952? A. Yes.

Q. When did you go after that? A. I don't remember the occasion, but it was always some—some unusual occasion to cause me to have to go there.

Q. About when? A. It was around July.

Q. What year; this year? No, it couldn't have been this year. The year before? A. I went there in 1952; [fol. 128] probably since 1952 I went on several occasions.

Q. What month? A. I couldn't remember. Like I said—

Q. Did you sign your real name when you went there? A. No; no one ever does.

Q. Did you? A. No, I didn't.

Q. Do you remember the names you used when you went there? A. No, no; any name. They are not interested in the names. Just sign any name; that's all.

Q. When you went there, you went by yourself all the time? A. Yes.

Q. You never took a lady up there? A. No, I never took a lady up there.

Q. But you saw Nora Elliott walk to the office; is that right? A. I did see her walk to the office.

Q. And did you assume that she would sign only her own name, or Mr. and Mrs. something? A. Well, I hadn't made up my mind to stay in that hotel.

Q. Well, you went up to the hotel, didn't you? A. I had not made up my mind to stay there.

Q. You rang the bell downstairs? A. I did. I escorted the lady there.

Q. You thought that she was going to stay at the hotel? A. I knew she was going to stay at the hotel.

Q. But you didn't know, you didn't make up your mind whether you were going to stay? A. It wasn't important that I make up my mind right away. When the girl went in to sign her name, I sit there. I had been drinking, and I was tired. I sit on a chair there in the hallway.

Q. You stopped drinking at seven o'clock in the evening; isn't that right? A. We had a—

[fol. 129] Q. Except for one drink that you had later on; isn't that right? A. Yes.

Q. And you know now that when you were up to the hotel, it was a little after one o'clock in the morning? A. When you drink as much as I did that day, it doesn't—

Q. I didn't ask you that. The last time, outside of the one drink that you told us about at the Crossroads, was at seven o'clock. You said you finished drinking at seven o'clock, when you left the house. A. Yes; that's true.

Q. So this is more than six hours later, isn't it? A. Yes; more than six hours later.

Q. Well, anyway, Nora Elliott did go into the office; isn't that right? A. She did go into the office, yes.

Q. Now, when Nora Elliott went into the office, you say that after she registered, that the lady clerk, Miss McGibbon, and Nora Elliott were starting to walk towards the alcove where you were seated; is that right? A. Yes. They just left the door.

Q. Didn't they pass you? A. No; they didn't get that far.

Q. Didn't you get up and start to walk in the hallway towards the back of the building and walk in front of Miss McGibbon and Nora Elliott? A. No, I did not.

Q. That didn't happen, you say? A. That didn't happen.

Q. You say that when Miss McGibbon came into this alcove, she started to scream? A. No; she didn't come into the alcove.

Q. She didn't— A. She didn't get that far.

Q. She didn't get that far? A. No.

[fol. 130] Q. How far did she get before she said something to you? A. She had just left the office door open.

Q. She just left the office door? A. Yes.

Q. And that's when she saw you sitting in the alcove? A. Yes. Miss Elliott was behind her.

Q. That's quite a distance, isn't it, from the office— A. No.

Q. Just let me finish the question, please. Isn't that quite a distance from the office door to the alcove where you were seated? A. No, it is not.

Q. It isn't quite a distance? A. No.

Q. Isn't it about twenty feet? A. That is not a fair representation. (Indicating)

Q. The diagram above you, People's Exhibit 1, is not a fair representation, you say? A. No; the length of the corridor is exaggerated.

Q. Will you now stand up and look at that diagram, please? (The witness complied.) I am talking about that diagram on top of the board, where it says, "Second floor"; "scale, one-half inch equals one foot". Do you see that? A. Yes.

Q. You say that that diagram is exaggerated? A. The length of the corridor is exaggerated.

Q. All right. You understand the diagram, sir? You

understand the diagram when you look at it? A. Fairly well, yes.

Q. No question about that in your mind? A. No question about it.

Q. All right. You may have your seat. (The witness resumed the stand.) Now, you say that when Miss McGibbon came to the office door, she said something to you? A. Yes, she did.

Q. What did she say? A. She said, "Mister, what's wrong?"

Q. Did you answer her? A. Yes. I was sitting in the [fol. 131] chair in the alcove. I told her, "Nothing." I had my face in my hand.

Q. Well, she never left the office door then? A. I didn't say that. I say she just hardly left the office door.

Q. I don't understand you.

The Court: "She just hardly left the office door."

A. She walked a little distance between the office door and where I was.

Q. And that's when she said, "what's the matter, mister?" And you said there is nothing wrong with you? A. Yes. I had my head down.

Q. Then what happened after that, Mr. Jackson? A. Then I raised my head. She took one look at my face and ran back toward the office door.

Q. What scared her, do you know? A. You tell me. I don't know.

Q. You don't know? A. No.

Q. When she ran back to the office door, or towards the office door, she said something, didn't she? A. If she did, I don't recall it. I don't recall. First—

Q. She said, "Stickup man! Stickup man!" A. That was after I had passed Miss Elliott behind. I passed Miss Elliott going toward the office door behind Miss McGibbon.

Q. In answer to the Judge's question, when the Judge said to you this morning; the Court said, "He said 'The lady asked me what was wrong; the manager of the hotel.' Speak up loud." And then you said—the witness—"I told her nothing was wrong. I was just tired. When I raised [fol. 132] my head she looked into my face and for some

cause or another she was frightened and ran back towards the office and called to some gentleman, whose name I don't know, and said, 'A stickup man. It's a stickup man.'" A. That's correct.

Q. "Miss Elliott was facing me, going towards the back, and I told her to get out. I had to repeat this twice because she did not like—know the cause of my telling her to get out, and frightened and probably confused. She left." Isn't that what you told us this morning? A. That's what I told you.

Q. When she ran back to the office, she cried out, "Stickup man"? A. That was after I passed Miss Elliott, in the corridor. If she whispered a secret I paid no attention to it.

Q. Did you have your gun out at that time? A. No, I did not.

Q. You mean, Mr. Jackson, that all she did was look at you and then cried out "Stickup man" without you having a gun in your hand? A. That is exactly what I mean.

Q. But nevertheless you told Nora to leave? A. I did. I ordered her out.

Q. And you saw her go down the steps; is that right? A. That's right.

Q. Now, at that time, you never announced a stickup? A. I never did.

Q. You didn't? A. No.

Q. That never happened? A. No; that never happened.

Q. All right. So when you went into the office—withdrawn. You did go into the office, didn't you? A. Yes, I did.

[fol. 133] Q. Well, weren't you scared when you told Nora to go down, and the lady hollered out, "A stickup man! A stickup man!" You didn't go downstairs? A. Of course not.

Q. You had no criminal intent at that time? A. No, I did not.

Q. Right? A. No.

Q. You never took your gun out at that time? A. No, I didn't.

Q. But you went into the office? A. Yes, I did.

Q. You didn't go downstairs? A. No, I didn't.

Q. But when you got into the office, you took your gun out? A. Yes, I did.

Q. Right? A. Yes.

Q. Why did you take your gun out? A. Because I didn't want her yelling out the window.

Q. You didn't want—? Talk up loud.

Mr. Healy: Don't yell at him.

The Court: No reason to yell; no reason to yell.

Mr. Schor: I can't understand the witness.

The Court: Then just say, "I don't understand you." All right. Proceed. You are getting along nicely. Go along the same way you are doing.

Mr. Schor: I apologize to the Court, the jury and counsel.

By Mr. Schor:

Q. Tell us why you pulled the gun out. Speak up loudly. A. When she ran into the office, yelling, "Stickup man", I thought she would be going to the window. I saw a man, a gentleman, in the office there with her. I naturally thought the first thing she will do is raise the window [fol. 134] and yell the same thing. My idea was to stop her.

Q. But you were an innocent man, weren't you? A. I had a gun.

Q. You were guilty of the Sullivan Law; is that what you mean? A. Yes.

Q. But nobody saw the gun until you took it out of your holster? A. But someone would have seen it if she had gone to the window and yelled out.

Q. But you wanted to make sure it was seen, so you pulled it out; is that right? A. If the policeman there saw us—

Q. What's that? A. If the policeman downstairs had been summoned up—

Q. Down "South"? A. Downstairs.

The Court: "Downstairs".

Q. All right. A. I had no intentions of shooting it out with him.

Q. I am not talking— A. So, as I had that gun, if the policeman downstairs had come up, I had no intention of shooting it out with him. I would naturally have had to give him the gun.

Q. I didn't come to that point in the sequence you are talking about.

The Court: You see, Mr. Schor, when you ask a "Why" question, he is allowed to give a reason. If you don't ask a "Why" question, then I'll order him to give an answer to your question. But if you ask for a reason I can't stop him. Proceed.

[fol. 135] *By Mr. Schor:*

Q. You had no criminal intent when you pulled the gun out; is that right? A. No, I hadn't.

Q. You were being, in your opinion, a peaceful citizen? A. Well, that's in your opinion.

Q. No, no; not my opinion; your opinion. I am asking about your opinion. You were being a peaceful citizen when you did pull your gun out; is that right? A. Will you just ask the question and let me answer it?

The Court: Don't say that now. He is allowed to ask questions. Go ahead.

The Witness: But he is asking a question and putting the answers in my mouth.

The Court: Then you answer that the question is wrong and what he is saying is wrong, if you don't agree with him. Is that clear?

The Witness: Yes, sir.

The Court: If you don't agree with him, you say that. Proceed.

By Mr. Schor:

Q. While you were in the office, you never said to this man and woman there, "This is a stickup"? A. I may have. I don't know.

Q. You may have? A. The woman threw the money to the counter. In the excitement, I wasn't thinking very clearly.

Q. Mr. Jackson, just a moment, please. Do you tell us now that you may have said to this man and woman in

the hotel, "This is a stickup"? A. I didn't take mental notes. In the excitement I may have said it. I don't remember. I was excited.

[fol. 136] Q. And when you are excited, you are liable to say anything? A. I am liable to forget what I said, too.

Q. Do you forget conveniently? A. I don't understand the question.

The Court: Don't argue with him.

Mr. Schor: I withdraw that.

Q. So that the lady did take some money and put it on the desk there or on a table, isn't that right? A. She tossed some money to the desk, yes.

Q. She what? A. She literally tossed the money to the desk, yes.

Q. She tossed the money to the desk? A. Yes.

The Court: Don't repeat his answer, please.

Q. Did you pick up the money? A. I did.

Q. What did you do with the money? A. I put it in my pocket.

Q. Do you recall now about the two people coming from upstairs into the office and two people coming from downstairs that came up to the office? Do you recall that? A. Yes; but which came first, I don't remember.

Q. You don't remember what came first? A. That's right.

Q. But four people did come into the office; right? Two couples? A. Yes.

Q. When they came to the office, you had the gun in your hand? A. Yes.

Q. Right? A. Yes.

Q. You told the four people as they came in separately, [fol. 137] a couple each time, you told them to sit down? A. I did.

Q. Did you tell them it was a stickup? A. No, I didn't.

Q. Did you say anything? A. I think there was some small talk, but I don't remember the words.

Q. What? A. There was some small talk, but I don't remember it word for word.

Q. Well, tell me, how long a period of time were you in this office with these people? A. It was only a few minutes.

Q. What do you call "a few minutes"? A. No more than three minutes, at most.

Q. Were the people looking at you? A. Yes, they were.

Q. Looking at your face? A. I would think so.

Q. What? A. I would think so.

Q. Did you turn around and say to them, "Take a good look. Take a good look"? Did you tell them that? A. I don't remember. I don't recall that.

Q. You wouldn't deny it, would you? A. I don't recall having said it.

Mr. Healy: That's objected to, if the Court please.

Q. So then you asked somebody there whether they have a vacant room; is that right? A. Yes.

Q. And you marched up all these six people to the top floor of the hotel; is that right? A. I didn't march them up.

Q. You didn't march them up? Well, did you order them out of the room; tell them to get out of the office? A. I was the last one out. I followed them out.

[fol. 138] Q. Did you have the gun in your hand? A. I don't remember. I might have. I may have. I don't remember.

Q. Did you tell them to go upstairs? A. Yes, I did.

Q. Did they obey your command, or your request? A. Yes, they did.

Q. And they all went up to the room on the top floor; right? A. They did.

Q. Did you go into the room too? A. No, I didn't.

Q. You stood by the door; is that right? A. I may have. I don't remember. I may have. I don't remember.

Q. Did you close the door of the room in which these people were in on the top floor? A. I don't remember. Someone closed the door.

Q. What? A. I don't remember. Someone did close the door. It could have been me or it could have been someone from the inside, I don't remember.

Q. You don't remember that? A. No.

Q. Before you left the top floor, did you say something to the people in the room? A. I may have. I don't remember if I did and if—no, I don't remember having said anything.

Q. You don't remember that? A. No.

Q. By the way, while you were in the office with these six people, did you walk over to the telephone and yank the receiver and break the receiver off the wall? A. That I did.

Q. You did that? A. I did.

Q. Did you mention something about needing money, "It takes money to buy ammunition and guns"? Did you mention something like that? A. I didn't, definitely not.

Q. That you definitely didn't say; right? A. Definitely not.

[fol. 139] Q. And so then you went downstairs after you left these people in the room; right? A. Yes.

Q. And you don't remember whether you said anything to them or not? A. I don't remember. Like I said, I was excited. I wasn't taking mental notes of what I said.

Q. Well, does this refresh your recollection, Mr. Jackson: didn't you say to them, in substance, "Don't make an outcry and nobody will get hurt"? A. No. I don't remember having said any such thing. It doesn't sound like me. It is not my diction.

Q. I say the substance of it. I don't say those exact words, the substance of it. Did you say something like it, that "Nobody should make an outcry and nobody would get hurt"? A. I probably did. I don't remember. I probably did.

Q. You knew you were carrying a loaded gun, didn't you? A. Not fully loaded.

Q. Well, how many bullets did you have in the gun? A. Four.

Q. Did you load the gun yourself? A. I did, yes.

Q. When? A. I don't remember. It wasn't the same day or it wasn't the day before. I don't take the shells and put them back in. I leave them there, that's all. I don't remember exactly.

Q. Well, when you went downstairs after you left everybody up there on the top floor, did you leave the building

before you met Nora Elliott, or did you meet Nora Elliott in the vestibule? A. No, I didn't meet her in the vestibule. I just left the vestibule, standing on the sidewalk.

Q. Just a moment, please. When you left the building, did you turn to your left or did you turn to your right? A. I don't remember having time to turn. As soon as [fol. 140] I stepped out of the vestibule, Miss Elliott approached me from a westerly direction.

Q. From the Classon Avenue side; right? A. Yes.

Q. How many feet did you walk away from the door before you met her? A. I don't know. Maybe two or three feet, I don't know.

Q. Two or three feet? A. Yes.

Q. Which way, towards Classon Avenue or towards Franklin Avenue? A. No. Straight out toward the street. I intended taking a cab there.

Q. You walked out straight out toward the curb; right? A. Yes.

Q. Two or three feet? A. Yes.

Q. When you first observed Miss Elliott coming from— A. Yes.

Q. —your left side? A. That's right.

Q. And you were talking to her; is that right? A. I didn't understand.

Q. I beg your pardon, sir? A. I didn't understand your question.

Q. I say, you were talking to her? A. She was talking to me, rather, when she approached.

Q. She said something to you? A. Yes. I don't know what it was. She did say something.

Q. You said something to her? A. Yes. I told her nothing was wrong, everything was all right.

Q. When? A. I asked her what she was crying about, that nothing was wrong.

Q. She was crying? A. Yes, she was crying.

Q. And what happened as you were talking to Miss Elliott? A. Well, a patrolman who was talking to a cab driver noticed the girl was crying. He walked over and asked her what was wrong with her, and he asked— [fol. 141] Q. Where did he—

Mr. Healy: I submit he be permitted to finish his answer.

The Court: Let him finish his answer. Did you finish or didn't you?

The Witness: No.

The Court: He didn't finish.

The Witness: He asked what was wrong with the lady. I told him nothing, we had a quarrel and she wasn't feeling well. I don't remember exactly what I told him, word for word. But he asked had there been trouble upstairs. Apparently he had noticed me leave the hotel. I think I said something about a fight. I don't remember exactly what I said, word for word, you know. Anyway, he insisted that I go back upstairs with him. I told him the lady was ill, she was only recently out of the hospital, and I asked him if it was all right if I sent her home. He said it was, after he reflected on it for a moment. I reached in my pocket, gave the lady a couple of bills, and told her to take a cab home.

By Mr. Schor:

Q. You gave the lady a couple of bills; is that right, bills? A. Bills. And told her to take a cab home, that I would see her later. The officer and I went back to the door. He rang the bell. No one answered. He rang several times. Still there was no answer. While we were standing there, some glass fell from the window onto the street, the sidewalk. Now convinced that there had been a fight or at least some sort of trouble upstairs, he tried [fol. 142] to knock down the door, that is, the second door in the vestibule. He tried unsuccessfully. And he asked me to help him. Well, knowing that when he got the door open he would go up the steps, or run up the steps, probably, because in my actions in helping him I suggested that there was a need of a—

Mr. Healy: I can't hear him, Judge.

The Court: Yes. Even your own lawyer can't hear you. Do you want a recess for a while?

The Witness: No, it's all right.

The Court: Then speak up. If you want a rest, I will call a recess for a few minutes.

Mr. Healy: Will you give us a couple of minutes' recess, Judge? I would like one, please.

The Court: Yes. All right, step out, folks. We will take a ten-minute recess. Please don't discuss the case. Everybody be seated. The jury will walk out.

(The jury retired from the courtroom.)

(After a ten-minute recess, the jurors returned, the roll was called, and the trial resumed.)

Mr. Schor: May I proceed, Judge?
The Court: Yes.

By Mr. Schor:

Q. This policeman that we're talking about came over to you and to Miss Elliott as you and Miss Elliott were [fol. 143] talking in front of this building; is that right? A. That's right.

Q. So you were first talking to Miss Elliott and then it was later on, a few seconds or a minute or so, when the cop came over; right? A. A few seconds.

Q. That is the sequence? A. That's right.

Q. Now, the cop asked you what was wrong; is that right? A. Yes.

Q. And you told him it was a fight upstairs?

Mr. Solovei: I object. Your Honor, there is no such testimony. I object to the form of the question.

The Court: Overruled.

Mr. Solovei: I respectfully except.

The Court: Overruled. Proceed.

By Mr. Schor:

Q. Did you tell him there was a fight—

The Court: If you don't agree with the question, see, or if you do agree with what the question intends to put to you, then you say, "No, that is not right." See? Do you get my point?

The Witness: Yes.

The Court: Because the evidence is the answer, not the question.

Proceed.

By Mr. Schor:

Q. Did you tell the policeman that there was a fight upstairs? A. Words to that effect.

Q. What? A. Words to that effect, yes.

[fol. 144] Q. Words to that effect, that there was a fight upstairs, and that's when the policeman insisted that you go with him upstairs? A. Yes.

Q. Right? A. Yes.

Q. Well, after he insisted that you go upstairs with him, you continued to talk with the policeman; is that right? A. Well, concerning the lady, yes, sir.

Q. You talked there for quite a while? A. No, not quite a while.

Q. Right? A. Not quite a while, no.

Q. A couple of minutes? A. A few seconds.

Q. You told him that the lady was sick? A. Yes.

Q. You told him the lady just came from the hospital? A. Yes.

Q. So that she wasn't feeling well? A. That's true.

The Court: Try to put it in the form of questions; instead of saying "You told him," say "Did you tell him?"

Mr. Schor: This is cross-examination.

The Court: I understand that. I knew it was cross-examination the moment you arose.

Mr. Solovei, you may get tired. Sit down.

Mr. Solovei: No. I was going to ask your Honor—he was using the term "lady" there. There were a lot of ladies around.

The Court: This is downstairs. The only lady he is talking about downstairs is Miss Elliott.

Mr. Solovei: I just want to get the record straight for myself.

Mr. Schor: That being—

[fol. 145] Mr. Solovei: All right.

The Court: Go ahead.

By Mr. Schor:

Q. So the policeman then said to you, "O. K., you can take her home"? A. Send her home.

Q. Send her home? A. Yes.

Q. So you put your hand in your pocket and you gave Miss Elliott—

The Court: We have had that. You have already brought that out.

Mr. Schor: Not yet.

Mr Healy: Yes, you did.

The Court: Try not to repeat, please.

Mr. Schor: All right.

By Mr. Schor:

Q. But you gave her some bills? A. Yes, I did.

Q. Right. Were the bills that you gave her the bills that you took from upstairs in the office? A. I wouldn't know. I had money of my own in my pocket.

The Court: Keep your voice up.

By Mr. Schor:

Q. And Miss Elliott left then, right? A. I watched her for a while walk in a westerly direction, but I don't know how far she got.

Q. You saw her go in a westerly direction? A. Yes. She started off in that direction.

Q. That's towards Classon Avenue? A. That's right.

Q. And then the policeman rang the bell of the hotel; [fol. 146] is that correct? A. That's right, that's correct.

Q. And there was no response? A. No response.

Q. He rang a few times more? A. He rang again. How many times more, I don't know.

Q. What happened when he continued to ring the bell? A. Well, then—

Q. What happened immediately after that? A. Immediately after? How long after the glass fell to the street? I don't know. I wouldn't say immediately after.

Q. No, I don't mean that sir. What I am trying to get from you is what happened, the single thing that happened, after he continually rang the bell, and I think you have just answered it by saying there was a crash of glass; is that right? A. Not immediately after he rang the bell.

Q. Not immediately after but that was the next thing that happened? A. Yes.

Q. Now, how long did it take, Mr. Jackson,— A. I couldn't know—

Q. Wait a minute. Let me ask the question first. How long did it take from the time you came out of the building and saw Nora Elliott and had the talk with Nora Elliott that you did, had the talk with the policeman that you did, give her the money for the taxicab, talk again with the policeman, and for the policeman to go into ringing the bell, until you heard the crash of glass? How much time passed? A. Quite a few seconds. I'd say at least—I'd say at least thirty seconds.

Q. Half a minute? A. Yes.

Q. All that took place in a half a minute? A. Yes.

Q. So the cop began to push the door inside, right, the [fol. 147] inner door? A. Yes. He mumbled something to me. We talked for a while, yes.

Mr. Healy: A little louder. I can't hear you.

The Witness: He talked for a while. He asked me a few questions, I don't remember.

By Mr. Schor:

Q. In the vestibule? A. Yes.

Q. Nora Elliott wasn't there, was she? A. No, she wasn't there.

Q. Just you and the cop? A. Yes, the policeman.

Q. You don't remember what he asked you? A. I'm not sure he asked me anything at all, but we did talk.

Q. Finally, the inner door was opened? A. No. That was after the glass.

Q. You heard a crash of glass? A. He tried to knock down the door.

Q. You and the cop broke in that inner door? A. First he tried alone. He couldn't. He asked my help.

Q. You helped him? A. Yes, I did.

Q. You didn't take out the gun to the cop and say, "Look, Officer, I'm carrying a gun. Take it from me"? You didn't say that to him, did you? A. No, I didn't.

Q. And then he ran up the stairs, didn't he? A. He ran up the steps, yes.

Q. Did you go upstairs, too? A. No. I entered the corridor just far enough to make him think that I was following him.

[fol. 148] Q. Were you trying to fool him? A. Yes, that's right.

Q. You wanted to get away from there; is that right? A. Yes, that's true.

Q. So you ran down the street, you got out of the building as the cop ran upstairs and you ran down the street? A. Yes, I did.

Q. Now, in which direction did you run, toward Franklin Avenue or towards Classon Avenue? A. Towards Franklin Avenue.

Q. How far did you run to Franklin Avenue? A. I don't remember. How far, I don't remember. But when I did run, I run into Miss Elliott. Instead of going home like I told her to, she had come back.

Mr. Healy: I didn't understand.

The Court: Yes. You must speak up, Mister, please. You seem to drop your voice and your own lawyer can't hear, not only the jury.

The Witness: When I ran out of the door back into the street, I ran into Miss Elliott, who had not gone home as I had told her to. Carrying her with me, I grabbed her behind the hand and pulled her behind me. The officer ran out, the patrolman, and grabbed me by the arm.

By Mr. Schor:

Q. Although Miss Elliott, when you left her, or when she left you, rather, walked in a westerly direction towards Classon Avenue— A. She started in a westerly direction.

Q. Just a minute, please. Let me finish the question. [fol. 149] When you came out of the building and ran in an easterly direction towards Franklin Avenue, you met her? A. At the door.

Q. And the cop came out and he grabbed hold of you by the arm? A. Yes.

Q. Isn't it a fact that you first met the cop by the doorway of this hotel while you were in the vestibule and the policeman tried to push the door open? Isn't that the fact? A. No, that is not the fact.

Q. That never happened? A. That never happened.

Q. Isn't it a fact that when the policeman finally was

able to get his arms into this hallway and grab ahold of you, that you applied some judo and flipped the cop and the cop fell right in front of the hotel? A. That never happened.

Q. That never happened? A. That never happened.

Q. And isn't it a fact that when the policeman fell in front of this hotel, that you ran to a taxicab almost in front of the hotel, a little closer to Franklin Avenue, opened the door, and Miss Elliott was right behind you? Isn't that the fact? A. The question—

Q. Just answer my question. Is that the fact?

The Court: Let him answer it.

A. You are asking me several questions.

The Court: That's right.

By Mr. Schor:

Q. Is it a fact, sir,—

[fol. 150] The Court: Mr. Schor, may I suggest something?

Mr. Schor: Yes, sir.

The Court: Instead of saying, "Is it a fact," why don't you frame your question and say, "Didn't you do this? Didn't you do that?" The jury will decide whether it is a fact or not.

Mr. Schor: Yes.

The Court: Proceed. Please accept my suggestion.

Mr. Schor: I will do that, sir.

The Court: All right. One question at one time.

By Mr. Schor:

Q. Did you flip the cop in front of the doorway to that hotel? A. No, I did not.

Q. Did you run toward a taxicab which was parked approximately fifteen, twenty feet toward Franklin Avenue against the curb? A. That I did.

Q. Did you open the door of the taxicab? A. I did.

Q. Was Miss Elliott right behind you? A. She was.

Q. Did you get into the taxicab? A. Yes, we did.

Q. Did the policeman come around on the street side of that cab and open the door? A. Yes, he did.

Q. And did he pull you out? A. Yes, he did.

Q. And then you struggled with him behind the taxi; isn't that right? A. We struggled.

[fol. 151] Q. And as you struggled with him, you pulled your revolver out; isn't that true? A. No.

Q. And as you struggled with the policeman, didn't he drop his nightstick? A. If he did, I didn't see it.

Q. Didn't you see Nora Elliott pick up the nightstick? A. I saw no nightstick at all.

Q. Didn't you tell Nora Elliott to hit him? A. No, I did not.

Q. You didn't say to Nora Elliott, "Hit him"? A. Of course not.

Q. While you were struggling with the policeman, did you see a nightstick? A. I never saw a nightstick at all.

Q. Did you hear someone say, "Kill him, kill him"? A. No. No, I didn't.

Q. What you heard someone saw was, "Don't kill him, don't kill him"; is that right? A. That was after the patrolman fired the first shot.

Q. The patrolman said, "Don't kill him"? A. After the patrolman had fired the first shot.

Q. After you heard someone say, "Don't kill him"? A. I heard someone say, "Please don't kill him."

Q. "Please don't kill him"? A. Yes.

The Court: Do you know who said that?

The Witness: It was a woman's voice. I don't know who it was.

By Mr. Schor:

Q. You stood there with your gun out, now; right? A. When?

Q. When you heard the words, "Don't kill him, please don't kill him." Didn't you have your gun in your hand [fol. 152] at that time? A. That's when the patrolman had fired the first shot. I was leaning against the car holding my stomach (indicating).

Q. Can't you answer my question, sir? My question is, did you have the gun in your hand at that time? A. The question—

Mr. Solovei: Your Honor, I should like the witness should be permitted to make an answer.

Mr. Schor: If it is responsive, I have no objection.

The Court: Please, Read the question, Mr. Strimpel, please. Listen to it carefully.

(The question was read by the reporter.)

The Witness: Yes, at that time I did have it.

By Mr. Schor:

Q. When did you take your gun out? A. When the patrolman pulls his, when I saw him pull his (indicating).

Q. Had the patrolman pulled his gun out of his holster? A. Yes.

Q. He already had pulled it out and that's when you pulled yours? A. I saw the light reflecting on his revolver. I knew he was pulling the gun. It was then that I pulled my own.

Mr. Healy: May he finish his answer, Judge?

The Court: I heard him finish it, but let the stenographer read it to see if he did.

[fol. 153] (The answer was read by the reporter.)

By Mr. Schor:

Q. Had the patrolman completed taking his gun out of the holster before or after you took yours out? A. I don't know. I suppose—I think mine came out a little before his did.

Q. You had the drop on him, didn't you? A. Yes, but I didn't shoot.

Q. By the way, when you went to New York by taxicab with your friends, who hailed the taxicab, you or your friend? Who hailed the cab, who called the cab over? A. I couldn't remember. I wouldn't know.

Q. What? A. I wouldn't know. I don't remember.

Q. Did you tell the taxicab driver to take you up to New York? A. Who told the cab driver to take us there, I don't remember.

Q. Whose idea was it to go to 42nd Street? A. My friend's idea.

Q. Did the taxi man say anything when you got into the taxicab? A. No, not that I remember.

Q. Did he refuse to accept you, Nathan Jackson, as a passenger? A. I don't think—exactly what are you talking about?.

The Court: When you left Brooklyn to go to New York, about seven o'clock or so, eight or ten o'clock, whenever it was that you went to New York.

The Witness: No.

[fol. 154] *By Mr. Schor:*

Q. He didn't say, "I don't want to take you to New York," did he? A. No, of course not.

Q. Now, who hailed the taxicab from 42nd Street to Central Park? A. I don't remember. Those things weren't significant to me, they weren't important.

Q. Well, did that taxi driver refuse to accept you as a fare? A. Did he refuse to accept me?

Q. Yes. Did he say anything when you went into the taxicab? Did he say, "I don't want to take you to Central Park," for any reason? A. No, of course not.

Q. He just took you up; right? A. Yes.

The Court: Did anybody refuse you as a passenger in a cab that night?

The Witness: No.

The Court: Proceed.

By Mr. Schor:

Q. When you got to the Crossroads, you say everybody ordered drinks; right? Your friend ordered a drink, his wife ordered a drink? A. Yes.

Q. Did Nora Elliott order a drink? A. Yes, she did.

Q. You ordered one; right? A. Yes, I did.

Q. Was this a waiter who came over to the table? A. I don't remember.

Q. Was it a bartender? A. I don't remember.

Q. Did somebody wait on you, did somebody bring the drinks over? A. No. My friend and I went to the bar to get some.

Q. And your friend went to the bar? A. Yes.

[fol. 155] Q. And you ordered drinks from the bartender? A. Yes.

Q. Did the bartender refuse to give you any drinks? A. No, he didn't.

The Court: We will adjourn now, gentlemen. I have much dictation. It is five minutes to four. We agreed to work until four.

Mr. Foreman and gentlemen of the jury, please don't discuss the case, read about it, look at television, listen to the radio, visit the scene, permit anyone to talk to you about it or about it in your presence. Keep an open mind, please.

Tomorrow morning at 10:30.

(Whereupon, the jury retired from the courtroom.)

(Whereupon, an adjournment was taken until October 6, 1960, at 10:30 o'clock a. m.)

Brooklyn, New York
October 6th, 1960.

(The jurors returned, the roll was called, and the trial was resumed.)

NATHAN JACKSON (Defendant) recalled as a witness, testified further as follows:

Cross Examination by Mr. Schor (Continued):

The Court: Mr. Jackson, I tell you again, please speak up good and loud. Proceed.

[fol. 156] *By Mr. Schor:*

Q. Mr. Jackson, yesterday you testified in substance that when the policeman first arrived in front of the building, you were talking to Nora Elliott, is that right? A. Yes.

Q. And then you told us—

The Court: Just one question to get the continuity, and don't repeat it again.

Mr. Schor: That is right.

The Court: Proceed.

By Mr. Schor:

Q. And then you told us that you gave Nora some money to take a taxicab? A. I did.

Q. Is that correct? A. I did.

Q. And then you were asked whether the money you gave Nora Elliott was part of the money that you took from upstairs, and I think your answer was that you were not sure of it, is that correct? A. That is correct.

Q. Now in what pocket or pockets did you carry the money that you had on your person that night? A. I couldn't say. I wouldn't know.

Q. Well, when you took the money upstairs in the office, did you put the money in the same pocket that you had your own money? A. I couldn't say.

Q. Well now, after you shot the policeman, you ran down Fulton Street towards Claver Place? A. Yes.

Q. Is that correct? A. I did.

Q. And you still have the gun in your hand, is that right? A. I don't remember if I had the gun in my hand then.

[fol. 157] Q. Well, when you spoke to the taxi driver, you had the gun in your hand, isn't that correct? A. I only remember getting into the cab. I don't remember whether I had the gun in my hand or not then.

Q. You still had the money in your pocket that you took from the hotel? A. I would suppose so unless I lost it.

The Court: You are supposing so, or you were supposing?

The Witness: I said, "I would suppose so unless I lost it while I was running."

The Court: "I would suppose so unless I lost it while I was running," is what he says now. Is that your answer?

The Witness: That is correct.

The Court: Proceed.

By Mr. Schor:

Q. But at the time you left the hotel, you had money in your pocket, that is correct, is it? A. Yes.

Q. And when you were running down Fulton Street,

you had the money? A. I just answered that. I wouldn't know. I think so, unless I lost it.

Q. Well, didn't you put the money on the back seat, as you were riding to the Cumberland Hospital? A. No, I didn't.

Q. Didn't you stuff it down the back of the seat? A. No, I did not.

Q. Did the policeman ever try to push Nora? A. If he did, I don't remember.

Q. Didn't you say to the policeman, "Don't push her out of the door because that is my wife." Didn't you [fol. 158] say that to the policeman? A. No, I didn't.

Q. That was a big wad of bills that you had taken from the hotel, wasn't it? A. I didn't notice the size of it.

Q. It was on the desk, wasn't it? A. Of course, it was.

Q. Do you recall when you put your hand on the money, whether it filled your fist? A. No, of course not. It was not important whether it filled my fist.

Q. That was not important, taking the money? A. No, it wasn't.

Q. Now at the hospital, you told us that somebody said to you that you could have water only if you spoke to them, is that right? A. That is right.

Q. Who did you say that to? A. I don't know.

Q. I mean, who said that to you? A. I don't know. I don't know his name.

Q. Was it the man who later on asked you a lot of questions? A. Well, several people later on asked me several questions.

Q. Well, there was a man there with a little machine; do you remember that? A. If there was such a man there, I didn't see him.

Q. Did you answer the questions that this man asked you? A. Which man? I don't know which man you are speaking of.

Q. Well, how many people asked you questions? A. I was asked questions when I first entered the hospital, when I was in the ward.

Q. When you first entered the hospital, you were in the Emergency Room? A. I was not asked questions then.

[fol. 159] Q. You were not asked questions? A. No.

Q. And then you were taken from the Emergency room? A. To the Ward.

Q. And from the Ward, you were taken to the X-ray room? A. Yes.

Q. After the X-ray room, you were taken back to the Ward? A. That I don't remember.

Q. You don't remember being taken back to the Ward after the X-rays? A. No, I remember going to the X-ray room, and when I woke up again I was in the Ward. That was the following morning, eight o'clock.

Q. I am not talking about eight o'clock in the morning. I am talking about what happened before. A. I don't remember leaving the X-ray room.

Q. You don't remember being asked questions in the Ward? A. When I first entered? Yes, but not when I returned from the X-ray room.

Q. You told your lawyer that when you were being asked questions, you said that you were—

Mr. Healy: I think that is an improper form of question. I do not want to be technical, but he did not tell me anything. He told the Court and jury here.

The Court: Yes, he testified to it on the stand, is the proper way to say it.

Mr. Healy: Yes, he testified.

The Court: He testified; put the question that way.

By Mr. Schor:

Q. When you were asked questions by Judge Healy, you said, "I told them that I was weak, that I could have [fol. 160] water only, if you spoke to them." Isn't that what you testified to yesterday? A. That is true.

Q. To whom did you say that? A. I don't know his name. This was when I entered the Ward for the first time.

Q. Did they give you water? A. Once, they did.

Q. Or did you take the water by yourself? A. They gave me the water.

Q. And then did you answer the questions? A. I gave my name.

Q. Well, did you give your address too? A. I don't remember— Yes, I think they asked me, and I think I gave my address.

Q. Did they ask you how old you were? A. I don't remember that.

Q. Did you tell them. "I will be 25."

The Court: Why don't you do it this way, Mr. Schor? "Were you asked this question and did you make this answer?" Have you got the statement?

Mr. Schor: Yes, I have.

The Court: Please do it that way.

Mr. Schor: All right.

The Court: Listen, Mr. Witness.

By Mr. Schor:

Q. Were you asked this question, "What is your name?"

The Court: Give him the time and the place first.

Mr. Schor: This is in the Ward.

[fol. 161] The Court: And who was the questioner, and who was the stenographer, so he will have the scene brought back to his mind, if you can; and then follow it with, "Were you asked this question and did you make this answer?"

By Mr. Schor:

Q. Mr. Jackson, I am now reading from the statement which is in evidence, Peoples Exhibit 14, which was taken in the Ward 46 at Cumberland Hospital, five minutes to four in the morning, by the Assistant District Attorney, and I ask you now, did he ask you this question and did you make this answer; "Q. What is your name? A. Nathan Jackson." A: I don't remember being questioned at that time in the morning.

Q. Was this question asked of you and did you make this answer: "Q. Where do you live? A. 446 Classon Avenue." Was that question asked and did you make that answer? A. I don't remember being asked that question; not at that time.

The Court: Did you live at 446 Classon Avenue?

The Witness: Yes, sir.

The Court: Is your name Jackson?
The Witness: Yes, sir.
The Court: Proceed.

By Mr. Schor:

Q. Were you asked this question and did you make this answer: "Q. How old are you? A. I will be 25." A. I may have given that answer but I don't recall.
[fol. 162] Q. At that time, would you have been 25? A. I was twenty-five, June 19th.
Q. On June 19th? A. Yes.
Q. Were you asked this question and did you make this answer: "Q. This morning did you go to the I. C. U. Hotel at 1124 Fulton Street? A. No." A. I don't remember the question being asked and I don't remember giving the answer.
Q. Were you asked this question and did you make this answer: "Q. After you got there, did you decide to stick up the hotel? A. Yeah, when the woman recognized me." A. There was some questions asked and I may have given some answers. I don't remember.
Q. Were you asked this question and did you make this answer: "Q. Did you have a gun with you? A. Yes." A. I may have said that. I don't recall having made that statement.
Mr. Schor: May I show to the witness this exhibit, and ask him to read it, and ask him to tell us what he remembered saying, and also what he does not remember saying.
The Court: No, you ask him any question you wish to, and let him answer.

By Mr. Schor:

Q. Do you remember being asked this question and making this answer: "Q. What did you say to her? A. I told her this is a stickup." A. No, I don't remember anything like that.
The Court: Would you mind following the Court's instructions? I am not telling you how to cross-examine, [fol. 163] but there is a law, and a rule, which I think we

should all follow. Put it this way; "Were you asked this question and did you make this answer?"

Mr. Schor: I thought I asked that.

The Court: You said, "Do you remember." The proper way is, "Were you asked this question and did you make this answer?"

Mr. Schor: You are right, Judge.

The Court: Proceed.

By Mr. Schor:

Q. Were you asked this question and did you make this answer: "Q. Did you ask her for the money? A. Yeah." A. I don't remember being asked any questions. I don't recall giving any answers after I had taken an operation. I was under the knife for two hours. I don't know what I said.

Q. How do you know you were under the knife for two hours? A. Because I was told that I was.

Q. Were you operated on before you gave these answers, or after you gave these answers? A. I don't know what time I was operated on. I don't even remember the operation naturally.

Q. My question to you is, Sir, did you make these answers before the operation or after the operation? A. How could I answer a question when I am telling you I don't remember giving any of the answers.

Q. Didn't you tell us before that you do remember somebody asking questions? A. Those were asking when— [fol. 164] Q. Let me finish my question, please. Didn't you tell us before that you do remember somebody asking questions, but you don't know who it was? A. When I entered the Hospital Ward, yes. That was the District Attorney.

The Court: Would you mind continuing, please, with any question and answer you wish to put to him, and then when you are finished with that, go to something else. You have a statement in your hand now, and you claim he answered those questions. He say he does not remember, and you have a right to ask him each and every question, if you wish, or any question that you wish.

By Mr. Schor:

Q. Were you asked this question and did you make this answer: "Q. Where did you meet the officer? A. On the street." A. It is the truth. I may have made that answer. It is the truth.

Q. Did you make that answer? A. I don't recall having made the answer.

Q. Were you asked this question and did you make this answer: "What happened when you met him? A. I said there was a fight upstairs." A. I don't remember having made it. I may have said something to that effect because I did say something to that effect, but whether or not I answered that, I would not know.

Q. If you made that answer, you say it was truthful? A. If I made that answer, it is the truth.

Q. Were you asked this question and did you make this answer: "Q. Then what? A. He insisted I go with [fol. 165] him so I got the best of him." A. He did insist that I go with him.

Q. Did you make that answer? A. I may have.

Q. Was that truthful? A. Well, yes, he didn't physically force me to go with him.

Q. Was it truthful when you said, "So I got the best of him? A. I don't even understand that phrase, "I got the best of him."

Q. Did you make that answer? A. I doubt seriously that I did.

Q. So the previous questions I just read, that was truthful, but this answer you gave, "So I got the best of him," that you are in doubt whether that was truthful? A. Not the way I would have phrased it.

Q. Were you asked this question and did you make this answer: "Q. How did you get the best of him? A. I know Judo." A. No, definitely not.

Q. That is not truthful? A. Definitely not.

Q. Were you asked this question and did you make this answer: "Q. You threw him over? A. Yeah." A. That is not true.

Q. Were you asked this question and did you make this answer: "Q. Where was your gun while you were giv-

ing him the Judo? A. In my holster." A. I could have said that. That is the truth; it was in my holster.

Q. That is also true A. It was true.

The Court: Do not repeat it, please. Let the answer stand as it is without any comment.

[fol. 166] *By Mr. Schor:*

Q. Were you asked this question and did you make this answer: "Q. Did you point the gun at him? A. Yeah." A. I don't recall ever having made any such statement.

Q. Were you asked this quesion and did you make this answer: "Q. What did you say to him? A. Told him not to be a hero." A. I doubt seriously that I answered that question. It is not the way I would have phrased it. It is not my diction.

Q. Were you asked this question and did you make this answer: "Who fired first, you or the police officer? A. I beat him to it." A. If I made any such answer as that, it is untrue. I don't recall having said that.

Mr. Schor: That is all.

Mr. Healy: That is all.

The Court: I will ask one question. Tell this jury, if you can recall, what you did with the money the girl you said put on the table, and that you took, from the time you took it until the time you were in the hospital. Tell the jury that.

The Witness: I probably put the money in my left pocket because I probably held the gun in my right hand. I don't know what happened after that. I might have lost it when I was in the cab. When I got in the hospital, my clothes were searched by the patrolman there. I don't know how much they found, of what they found.

The Court: Step down.

Mr. Healy: That would be the defense as far as Jackson is concerned, with the exception that I have some rec-
[fol. 167] ords here from the Cumberland Hospital, which we have discussed, that I should like to offer in evidence, if possible.

The Court: That is a question of law, and you had better come up here and discuss it with me.

(The following was had at the Bench not in the presence of the jury.)

Mr. Schor: I am going to have the doctor here to testify to those records, if your Honor pleases.

The Court: Is that agreeable?

Mr. Healy: Yes, and then I will be able to determine then what I should do with respect to the records I spoke about.

The Court: All right, then we will wait until the District Attorney will call the Doctor.

(The following was had in the presence of the jury.)

The Court: Mr. Solovei, are you ready to proceed with your defense now? You may do so, if you wish to. The choice is with you. You do not have to.

Mr. Solovei: You mean, to proceed at this time?

The Court: Yes. Judge Healy is going to rest, I presume.

Mr. Healy: I am going to rest with the reservation made at the Bench.

The Court: The reservation has been put on the record, [fol. 168] that the physician will be called by the District Attorney.

Mr. Healy: Yes.

The Court: Then you rest?

Mr. Healy: Yes.

Mr. Schor: Before Mr. Solovei proceeds, may I at this time offer in evidence Peoples Exhibit 13 for Identification, consisting of one $5.00 bill, and twenty-nine $1.00 bills.

Mr. Healy: I object to it on the ground that no proper foundation has been laid.

The Court: Objection overruled.

Mr. Healy: Exception.

The Court: It will be marked only with respect to the defendant Jackson, and not to be considered against the other defendant, Elliott.

Mr. Schor: I am only offering it as against Jackson.

The Court: Mark it in evidence.

(Received and marked now Peoples Exhibit 13.)

The Court: Mr. Solovei, the case is with you.

Mr. Solovei: What is that, your Honor?

The Court: The case is with you.

Mr. Solovei: Shall I proceed in spite of the fact that there is some other testimony?

The Court: You may proceed now, and Judge Healy and Mr. Schor have made an agreement as to procedure with respect to themselves, and that has no bearing upon you.

[fol. 169] Mr. Solovei: I will call the stenographer from the District Attorney's office at this time.

The Court: Mr. Schor, call the witness that Mr. Solovei wishes to examine.

Mr. Schor: Yes, your Honor.

* * * *

[fol. 170]

DR. GEORGE SUAREZ, residing at Cumberland Hospital, Brooklyn, New York, called as a witness in rebuttal on behalf of the People, being first duly sworn by the Clerk of the Court (Mr. Reich), was examined and testified as follows:

Direct Examination by Mr. Schor:

Q. Dr. Suarez, are you a physician duly licensed to practice medicine in the Philippine Islands? A. Yes, sir.

Q. And are you now an Assistant Resident Physician at Cumberland Hospital under the Visitors Exchange Program between the United States and the Philippines? A. Yes, sir.

[fol. 171] Q. Were you working at the hospital on June 14, 1960? A. Yes, sir.

Q. Do you recall a patient being brought to Ward 46, a patient whose name was Nathan Jackson, and he was being treated for a gunshot wound in the abdomen? A. Yes, sir.

Q. Did you prescribe certain medication for him while you were there? A. Yes, sir.

Q. Now, did you at any time tell Jackson that if he wanted some water he must answer the questions that were being put to him by some men that were around him at the bedside? A. No, sir.

Q. Did you hear anybody—

The Court: In your presence did you hear anyone else say that to Mr. Jackson?

The Witness: No, sir.

The Court: Would you please establish the time, Mr. Schor, of when he saw the defendant Jackson?

By Mr. Schor:

Q. Doctor, can you tell us now without looking at the record about what time you first saw the patient, or would you rather look at the record to refresh your recollection? A. Well, I had better look at the record.

Q. All right. I show you these papers and ask you whether this is the hospital record of Cumberland Hospital. Are they, sir? A. Yes, sir.

Q. You may look at them.

The Court: Does that chart show when you first saw him, Doctor?

[fol. 172] The Witness: Not the exact time is stated.

The Court: What?

The Witness: The exact time is not stated.

The Court: From your recollection, do you know about when you saw him first and in what part of the hospital?

The Witness: Well, usually—

The Court: Not "usually." We want to get this case.

The Witness: When a case like this comes into the hospital, we are called immediately and we come down immediately.

The Court: Were you the first physician who saw him?

The Witness: Yes, sir.

The Court: Is that the best answer you can give?

The Witness: That's the best answer.

The Court: Can you give us the time of the operation, if any?

The Witness: Well, the operation should be here.

The Court: See if you can—

The Witness: We have the time of the operation, starting from 5:00 a. m. and lasting up to 8:15 a.m.

The Court: All right. Proceed.

By Mr. Schor:

Q. Did you ever tell Jackson that if he wanted to be left alone, he had to give answers to the questions that were being put to him by these men? A. No, sir.

[fol. 173] Q. You never said that to him? A. No.

The Court: In your presence did you hear anybody say that to him?

The Witness: No, sir.

Mr. Schor: You may inquire.

Cross Examination by Mr. Healy:

Q. Doctor, could I see that report, please? A. Yes, sir (handing same to Mr. Healy).

Q. Doctor, you stated that Mr. Jackson, the defendant here, was treated for gunshot wounds and medication was prescribed; is that right? A. Yes, sir.

The Court: A little louder, please, Doctor.

The Witness: Yes, sir.

By Mr. Healy:

Q. A little louder, Doctor, will you. Can you tell us what medication was prescribed, Doctor? A. We prescribed demerol.

Q. What is that? A. Demerol.

Q. Yes. A. And I think atropine.

Q. Well, you say he was operated on, Doctor; is that right? A. Yes, sir.

Q. I am reading from here and I assure you that I am reading this correctly. Would you say that the operation showed a laceration of the liver and a hemorrhage of the right lung? Would that be correct? This is signed by Dr. Mendelson. Is he one of your associates there? A. Oh, Dr. Mendelson is the X-ray doctor.

[fol. 174] Q. Well, will you look at that (handing same to the witness)? A. Yes, sir.

Q. Now, can you tell of your own independent recollection, or would you have to look at this report to tell

me whether or not he was anesthetized? Was he given ether for the operation? A. I beg your pardon?

Q. Was he—

The Court: Was he given ether for the operation?

By Mr. Healy:

Q. Does the record show that? A. I couldn't remember, because the anesthetist takes care of that. The one who administers anesthesia takes care of that.

The Court: You can't operate in a case like his without giving him anesthesia?

The Witness: We operate with anesthesia, but the exact anesthesia I couldn't state.

The Court: The amount given he couldn't state.

By Mr. Healy:

Q. Does the record here from the hospital show the amount, Doctor, that was given? That is all I want to know. Could you look this over and tell me that? A. The thing that was given here, I think is CC-86. That's the formula. I don't remember exactly what this—

[fol. 175] The Court: At what time did the doctor give the patient anesthesia before the actual operation?

By Mr. Healy:

Q. That's correct.

The Court: That is what Judge Healy wants to know. How long before the operation was the anesthesia given? You testified that the record shows the operation commenced at 5:00 a. m.

The Witness: Yes.

The Court: How long—

Mr. Healy: I don't think he did. I think he said in his opinion. The record doesn't show that. Maybe I misunderstood.

The Court: You may be right and I may be right. We'll see. Does the record show when the operation began.

The Witness: This is the operation card here.

The Court: At what time?

The Witness: 5:00 a. m.

The Court: The record shows that?
The Witness: Yes.
The Court: 5:00 it started and 8:00 o'clock it ended?
The Witness: 5:00 o'clock, that's when they started the anesthesia.
The Court: At 5:00 they started the anesthesia.
Mr. Healy: Fine.
The Court: All right. We have it now.

[fol. 178] *By Mr. Healy:*

Q. What does that mean, Doctor? You told us they gave him a certain amount. What does that mean? A. I really don't see what this formula stands for now. I would have to consult the anesthesiologist.
Q. What does the paper say? A. CC-86.
Q. What does CC-86 mean, will you tell the jury and the Court? A. I say it is the formula. I can't recall now exactly what it is.
The Court: But it does have reference to the amount given to the patient?
The Witness: No, no. This is the formula of the anesthesia.
The Court: You mean the kind of anesthesia?
The Witness: The kind of anesthesia; it does not indicate the amount.

By Mr. Healy:

Q. And that record doesn't show the kind of anesthesia that was given? A. This is the agent; this is the kind of anesthesia, CC-86.
Q. But you don't know what it is A. I don't recall what it stands for now.
Q. You don't know what it stands for. Well, did you tell us, Doctor, that you prescribed demerol; is that right? A. Yes.
Q. What is demerol? A. Demerol is a preanesthetic medicine.
Q. Yes. A. Its main action is to relieve pain.
Q. Deaden pain? A. Deaden pain.

[fol. 177] The Court: Can you get the time, Judge Healy, when that was administered, if you can?

By Mr. Healy:

Q. Could you tell us what time demerol was prescribed for him? A. From our records it was stated here. It was given at 3:55 a. m.

Q. 3:55. Well, will that put you to sleep, demerol, Doctor? A. Well, it will make you—

Q. Dopey? A. It will make you dopey.

Q. And what was the other one, atropine—

The Court: Atropine, a-t-r-o-p-i-n-e.

By Mr. Healy:

Q. Atropine, what is that? A. Oh, it is not atropine. It is scopolamine.

Q. What is that, Doctor? A. It dries up the secretion.

The Court: It dries up the secretion?

The Witness: Of the throat and the pharynges and the upper respiratory tract.

The Court: Judge Healy, let me read from the record.

Mr. Healy: Go ahead.

The Court: Demerol 50 mgm; that means milligrams. Scopolamine. It says "gr"—I guess that means gram—1 over 150. Time initiated 3:55 a. m.

Mr. Healy: All right. Thank you, Doctor. That's all, Doctor.

[fol. 178] *Redirect Examination by Mr. Schor:*

Q. Doctor, you just told us that demerol makes a person dopey; right? A. Yes, sir.

Q. How long does it take from the time it is administered until the patient feels the effect? A. Well, it manifests its action about fifteen minutes after it is injected.

Q. Fifteen minutes later? A. About fifteen minutes later.

Mr. Schor: Thank you very much.

Recross Examination by Mr. Healy:

Q. Doctor, just a minute. Doesn't the physical condition of the person to whom it is administered make some difference as to how long it will take to take effect? Wouldn't it take effect in a shorter time, perhaps, on one person that it might on another; isn't that so? A. In children, for example, the same dose might have a faster effect.

The Court: Judge Healy asked you, doesn't the physical condition of the patient to whom you inject have an effect on how long before it takes effect?

The Witness: Oh, no.

By Mr. Healy:

Q. It never would? A. Not much difference.

Q. So if a person was in good health and took demerol, the effect wouldn't be any different? A. Not much different.

Q. Please. Then if a man shot through the liver—is that right? A. Not much different.

[fol. 179] Q. But there would be some difference, wouldn't there? A. Well, one or two—

Q. What? A. I couldn't say. I don't think there is much difference.

Q. You don't know, do you? A. No?

Q. You don't know, do you? A. I know, sir.

Q. But you say there is some difference. A. Well, fifteen minutes is usually the time of action after you inject it.

Q. For a healthy person? A. For a healthy person, yes. It operates individually.

Q. How about a person who, for instance, has been shot through the liver, as your report shows there? Would that be the same time as for a healthy person? Do you mean that, Doctor? A. Yes, sir.

The Court: Before, you said "Not much difference," which means there is some difference; isn't that so?

The Witness: Well, I think there is not—I don't think it would make much difference.

The Court: All right. Anything else, gentlemen?

By Mr. Healy:

Q. Is there anything on that report to show when it did take effect? There isn't anything on there, is there? A. No.

Q. No? A. No.

Q. That report shows that this defendant had lost 500 cc's of blood. Now, would that make any difference [fol. 180] in the time? A. I will have to check my records with that 500 cc's of blood.

Q. The report—the record shows that he had lost 500 cc's of blood. Now, I am asking you, would that make any difference in the time that this— A. I don't think so.

Mr. Healy: That's all.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

REUBEN COLBERT, residing at 46 St. Edward's Street, Brooklyn, New York, called as a witness in rebuttal on behalf of the People, being first duly sworn by the Clerk of the Court (Mr. Reich), was examined and testified as follows:

Direct Examination by Mr. Schor:

Q. What is your business, Mr. Colbert? A. I am a nurse's aid at the Cumberland Hospital, Brooklyn.

Mr. Healy: I didn't get that.

The Witness: I am a nurse's aid at the Cumberland Hospital in Brooklyn.

By Mr. Schor:

Q. How long have you been a nurse's aid? A. Four years and five months.

Q. Were you working at the hospital on June 14, 1960, in the early hours of the morning? A. Yes, I was.

[fol. 181] Q. Do you recall when a patient was brought up to Ward 46, and the patient's name was Nathan Jackson? A. Yes, sir.

Q. Suffering from gunshot wounds; do you remember that? A. I recall.

Q. Were you working in Ward 46? Was that your assignment? A. That's right.

Q. Did you work over this patient? A. Yes, I assisted with him, yes.

Q. Did you, Mr. Colbert, or did anybody else in your presence say to the patient, Jackson, that if he wanted some water he must answer certain questions?

The Court: Can we fix the time, please?

The Witness: Pardon?

By Mr. Schor:

Q. Just a minute, please.

The Court: Counsel, Mr. Schor and Judge Healy, step up.

(The following took place at the bench, out of the hearing of the jury:)

The Court: I want to keep this to strict rebuttal.

Mr. Healy: That's right.

The Court: Judge Healy raised the point in cross-examination that sedation of a kind was administered to the patient.

Mr. Healy: Some kind.

The Court: And therefore he is going to contend and he does now that the confession hasn't the weight the [fol. 182] law requires. Is that your purpose?

Mr. Healy: That's correct. There are two, one statement and another statement. One statement to the police and one statement to the District Attorney.

The Court: Well, the one to the police was what hour, I would like to know, and the one to the District Attorney was what hour?

Mr. Healy: The one to the police.

Mr. Schor: To the police, to Detective Kaile, at two o'clock.

The Court: Get the statement.

Mr. Healy: The statement that I raised the point about. This is the statement taken by the District Attorney, by Mr. Postal.

The Court: Yes.

Mr. Healy: Mr. Lentini being the hearing reporter. That was taken at 3:55.

The Court: That's the time that you say he was in no mental condition to make the statement?

Mr. Healy: That's correct.

The Court: Is that correct?

Mr. Healy: That's correct.

The Court: I will only allow rebuttal with respect to that. Isn't that your point?

Mr. Healy: That's my point.

The Court: You don't want to be bothered with anything else, do you?

Mr. Healy: No.

The Court: Then around that time. That's the time [fol. 183] I want you to offer in evidence in rebuttal, if you have any.

Mr. Schor: The defendant Jackson testified that when he was in Ward 46, and he cannot fix the time also, he says that he was questioned by some people there—he doesn't know who they were—that he asked for water and they refused to give him water unless he answered the questions.

The Court: What time did he get to Ward 46?

Mr. Healy: Judge, if that is the only question you are going to ask him, as to the water, I would have no objection.

The Court: Well, that's all I care about.

Mr. Schor: That's all I am talking about.

Mr. Healy: If you go to anything else, I will object to it.

Mr. Schor: That's all I am talking about.

Mr. Healy: I won't object.

The Court: Then we agree.

Mr. Healy: On that we agree, as long as he doesn't go any further than that.

Mr. Schor: That's all.

The Court: All right.

(Back in the presence of the jury:)

By Mr. Schor:

Q. Mr. Colbert, did you or did any other person in your present, while Jackson was lying in bed in Ward 46, say to Jackson that if he wanted some water he must answer the questions? A. No, I didn't hear anything of that kind.

[fol. 184] The Court: Did you say that to him?

The Witness: No.

By Mr. Schor:

Q. Did you or did anybody in your presence say to you that he couldn't have any more water until he answered the questions the way they wanted the answers to be? A. No, I didn't hear that.

Q. Did you or anybody in your presence say to Jackson that if he wanted to be left alone, that he had to give them answers to the questions being put to him? A. No.

Q. Did you give Jackson any water? A. No, I didn't.

Q. Did he ask you for water? A. He did.

Q. Did you say something to him? A. I told him he couldn't have any water unless he got the doctor or nurse's permission. It is the procedure of the hospital to don't give any water to any pre-ops.

The Court: Pre-ops?

The Witness: Pre-ops.

The Court: You mean who were about to be operated on?

The Witness: That's right.

By Mr. Schor:

Q. Did you give him any substitute? A. No.

Q. Did you wipe his lips with anything? A. No, I didn't.

Mr. Healy: I object to this as improper.

[fol. 185] Mr. Schor: All right. Thank you. You may inquire.

The Court: All right.

Cross Examination by Mr. Healy:

Q. Well, the fact is he did ask you for water; that's right, isn't it? A. Yes, he did.

Q. The fact is, you refused to give him the water; that's true, isn't it? A. That's right, I did.

Mr. Healy: That's all.

Mr. Schor: Thank you.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

INEZ SMITH, residing at 937 Jefferson Avenue, Brooklyn, New York, called as a witness in rebuttal on behalf of the People, being first duly sworn by the Clerk of the Court (Mr. Reddin), was examined and testified as follows:

Direct Examination by Mr. Schor:

Q. What is your profession, Miss Smith? A. I am a licensed practical nurse.

Q. On June 14, 1960, where were you working? A. Ward 46, Cumberland Hospital.

Q. Do you recall sometime in the early morning a patient being brought up from the Emergency Room named Nathan Jackson? A. Yes, I do.

[fol. 186] Q. And were you attending Nathan Jackson? A. Yes.

Q. Did you, Miss Smith, or anybody in your presence say to Jackson that if he wanted some water he must answer their questions? A. No.

Q. Did you or anybody in your presence say that he couldn't have any more water, or any water, until their questions were answered the way they wanted them to be answered? A. No.

Q. Did you or anybody in your presence say to Jackson that if he wanted to be left alone, he had to give answers to the questions put to him? A. No.

Mr. Schor: You may inquire.

Cross Examination by Mr. Healy:

Q. You were not attached to the District Attorney's office, were you, at that time? A. I don't understand your question.

Q. I say, you were not attached to the District Attorney's office, were you? A. Am I attached to the District Attorney's office?

The Court: Employed by.

A. No.

By Mr. Healy:

Q. In other words, you were not there representing the District Attorney, yourself asking questions, were you? A. No.

Q. You didn't ask any questions, did you? A. Ask who questions? I don't understand.

[fol. 187] Q. You asked him questions in your capacity as a nurse; right? A. Asked the District Attorney any questions?

The Court: No, asked the patient any questions.

The Witness: No.

By Mr. Healy:

Q. The District Attorney has asked you if you asked this defendant some questions and you answered that; right? A. Did I ask the defendant questions? Concerning what? I don't follow you. I don't understand.

Q. What I want to know is this: You have told us that when you were asking questions, you yourself, you didn't say to the defendant, "You can't have any water."

Mr. Schor: I object to the form of that question.

The Court: Overruled.

By Mr. Healy:

Q. Is that right? A. Did I say to the defendant he cannot have water?

Q. Yes. A. I told him he couldn't have water.

Q. He couldn't have it? A. That's the rules—

Q. Please, please.

The Court: Let her finish.

Mr. Schor: Let her finish.

By Mr. Healy:

Q. Now— A. May I finish, please?

[fol. 188] The Court: Let her finish.

The Witness: That's the ruling of the Surgical Ward. Any pre-op patient is strictly "NBO"; nothing by mouth.

By Mr. Healy:

Q. What does that mean? A. Nothing by mouth. No food.

Q. Nothing? A. Nothing at all by mouth.

Q. That is when the defendant is in a pretty serious condition, isn't it? A. At all times, all patients.

Q. And you know from your experience that many times persons crave for water, they ask for it, and you don't give it to them; isn't that correct? A. Water?

Mr. Schor: I object to that about other patients.

The Court: Overruled.

By Mr. Healy:

Q. Isn't that right? You are a practical nurse; isn't that so?

The Court: Answer the question.

By Mr. Healy:

Q. Can't you answer me? A. Would you please ask that question again?

Q. Yes. You have got your rules from the doctors that you are not to give a person of certain physical condition water; right? A. That's right.

Q. And naturally you, as a good nurse, and I admit [fol. 189] you are, carry out the doctor's orders, don't you? A. True, yes.

Q. My point is, there are occasions when people come in this hospital who are either shocked, pained, hurt; they want water, and they ask you for it; isn't that right? A. They ask for it, but under that condition they can't get it, no.

Q. That's right, so this defendant did ask for it, didn't he? A. Yes, he asked for water.

Q. And you told him, "No, you can't have it." A. Yes, I told him no.

Mr. Healy: That's all.

The Court: Step down.

Mr. Schor: Thank you very much, Miss Smith.

(Witness excused.)

The Court: Next witness.

VITO LENTINI, having previously been duly sworn, recalled as a witness in rebuttal, and testified further as follows:

The Court: Strictly rebuttal, Mr. Schor.

Direct Examination by Mr. Schor:

Q. Mr. Lentini, you have previously testified in this case, sir. A. That's right.

Q. And you are the hearing reporter who went to the Cumberland Hospital, as you testified previously; correct? A. That's right.

Q. Now, when you were at the bedside of the defendant, Nathan Jackson, taking down the question and an- [fol. 190] swers, did you or anybody in your presence say to Jackson that if he wanted some water he must answer the questions put to him? A. No.

Q. Did you or anybody in your presence say to him that he couldn't have any more water or any water until he answered the questions the way they wanted the questions answered? A. No, sir.

Q. Did you or anybody in your presence say to Jackson that if he wanted to be left alone, he had to give answers the way they wanted to be heard? A. No, sir.

Mr. Schor: You may inquire.

The Court: Proceed.

Cross Examination by Mr. Healy:

Q. Mr. Lentini, while you were there asking these questions, did you see Mr. Colbert, the gentleman who testified here a minute ago, the male nurse? Did you see him there? A. I saw hospital personnel but I can't recognize him particularly.

Q. All right. Do you remember he was there at the time you were asking the questions? A. I don't remember that he was there.

tious. It is a bit psychopathic, if we may say so. You, Mr. Foreman and gentlemen of the jury, need no thanks from me for what you have done in this most important case. You and I have much in common.

Out of the millions of people in this great State of New York, you gentlemen have been chosen to sit in judgment upon one of your fellow men. Out of the thousands of lawyers in New York City, my associate counsel and myself have been chosen to represent the defendant. And as I want no thanks for what I have tried to do in this case, I offer you none, but ask instead that you allow me to say that I greatly appreciate the attention you have given.

We have heard the evidence. I just wonder if we have listened carefully, and given heed to one particular admonition that you gentlemen remember was given to you every time you left this courtroom, which Judge Barshay enunciated to you, because as a matter of law he was obliged so to do. It was not a desire on his part. It was his duty as the Judge to say to you, "Gentlemen, as you leave this courtroom to go to your home, or to go to lunch, or during the recess, keep your minds open. You must not express or form any opinion as to the guilt or innocence of these defendants until the case is finally submitted to you after the charge of the Court."

Now gentlemen, if there is anybody here therefore who does not care to heed that admonition; if there is [fol. 195] any one of you jurors who have said, "Oh, I have made up my mind already. I have this guy pegged from the minute he sat down there in the courtroom, and I don't like the looks of him. I don't like the atmosphere of the case; of course, he is guilty, and I will sit here patiently as a juror and let the lawyers talk, and it won't make any difference to me. I have made up my mind."

Now, if there is any juror who has that thought, that finds lodgment in his mind, there is no need for me to talk to you gentlemen. There is no need of me taking up your good time, or the time of the Court, but that is your own conscience.

I have confidence, Mr. Foreman and gentlemen of the jury, that you will remember all during the summation

here, and all during the charge of the Court that admonition of Judge Barshay.

We might as well be frank with one another. It is awfully hard to remove prejudice from our minds. It is awfully hard, and I appreciate it, to get the thought out of our minds that this was a police officer who was killed. And it is awfully hard for us sometimes to just shed a piercing light of truth and equity through the darkness of prejudice that undoubtedly surrounds this case at the outset.

Well, you now probably appreciate, Mr. Foreman, the significance of my questions propounded to you when I examined you as jurors last week. I did not have to take you. I could have excused you; but you all raised [fol. 196] your hands before your God, and gave me, and gave the Court the solemn promise that you would decide this case on the law, without any sympathy or any prejudice. And I am relying upon that promise.

If Jackson is convicted of murder in the first degree because you fooled me, the responsibility is mine; no one elses. He did not take me as his lawyer. I am not the counsel of his choosing.

So I ask you just to bear with me, if you will, with no appeal to you, or attempt at oratory whatsoever, as we briefly review the facts. I know I have a sweet-sounding voice. I am not egotistical. I know I declaim well. I know I enunciate words well. I know I can entertain you here possibly for an hour, and you would like the sound of my voice, and I would paraphrase on my sentences, and what would you do—and you would do it properly—you would go into your jury room, and say: "That fellow Healy is a nice fellow. He talks well. We like to hear him, but what has he said? What has he said to assist us blue ribbon jurors to perform a most sacred duty incidental to our right of citizenship in this great State of New York? What has he done to help us to decide whether he shall die or he shall live?" So I prefer therefore to talk to you as a lawyer; figuratively speaking perhaps to constitute myself perhaps a thirteenth juror, who might come into the jury room with you, to discuss the facts of the case.

[fol. 197] So that my memory does not fail me, I will try to just check off a few things here in the book, on the official record, because it is on the record that we are going to vote in this case.

Now, as I said, gentlemen, you may hear law in this case, and I know you will—not that you may, I know that you will; you may hear law that you never heard of before. There are very interesting questions of law in this case, which this zealous mistress, this great State of New York, says must control the trial of this case, and every criminal case.

It is not the province of counsel, nor is it my purpose, to enunciate the law, because you must take the law from the Court. But I am going to sum up to you on certain propositions which I believe will be enunciated to you, and if they are, I simply ask you to afford me the courtesy of trying to apply the facts to the law, and if the law on which I base my summation is not enunciated by Judge Barshay, certainly disregard anything which I have said in the summation.

What are we trying here, gentlemen? We are trying a homicide case. The ordinary laymen, I know you don't —but the ordinary laymen will sometimes say, "Well, homicide means murder. That means murder in the first degree; somebody is killed." Well, you will listen to the law of the Court as to what homicide means. You will listen to different kinds of homicide which you must [fol. 198] consider in this case, because this indictment charges murder in the first degree.

And let me say at the outset, Mr. Foreman, that I do not ask you to acquit Jackson—I would be more than affectatious if I asked for an acquittal in this case. But I do say, and I going to argue upon it on a proposition of law, that any guilt that is his is murder in the second degree, or manslaughter, and you will get the definition of both of those degrees of homicide, which will be charged to you in the case, and the definition of reasonable doubt.

Listen to what the Court says about what you must do in the instant case.

I believe that you will not only be charged common law murder; that means murder in the first degree; the killing

with premediation and deliberation, with intent to kill; not only will you be charged murder in the second degree, with intent to kill, but without the premeditation; not only will you be charged manslaughter in the first degree, where there is no need for premeditation or deliberation or intent; but that you will also be charged another form of murder, which possibly some of you gentlemen have read about in the papers but have never heard defined as a matter of law; namely the duty will be yours to decide Jackson's guilt on the question of common law murder—that is the one I described, where you have the intent, and deliberation, and premeditation; but you will also be charged that you must consider whether or not he is guilty of the crime of felony murder, a felony [fol. 199] murder committed during the commission of a felony—in this case the felony of robbery, where you need no intent; you need no deliberation, and you need no premeditation.

If Officer Ramos was killed while the felony was in progress, you decide whether it is felony murder. If he was not killed while the robbery was in progress, but while it was over, and while this man was making his escape, after the felony had stopped, you listen carefully to the charge of the Court as to whether or not you agree with me—and this is fair comment on the evidence—that this is not felony murder; this is common law murder, after the commission of the felony, the crime having been committed while he was trying to get away. That in substance is the theory of the defense.

Now then, we assume now that we are in our jury room, and it is the logical question, I should imagine, to decide: "Now, the Judge has told us our responsibility is to determine whether he is guilty of common law murder or felony murder. First, let us see. Mr. Healy concedes that there was a robbery." I concede that he robbed that place. The facts clearly demonstrate it. I concede that he robbed that lady. No doubt about it.

But the crux of the defense is this; although he committed that robbery, had he completed the robbery, and was he trying to get away and escape at the time the officer was assaulted?

[fol. 200] Before I just review the facts, I ask you in justice to me at least to listen carefully to the arguments that might be advanced by some one, "that although the robbery felony had been committed, well perhaps we could find him guilty of felony murder on the felony of assault, which we might say he committed on the officer."

You listen carefully to the charge of the Court, and the question as to whether or not that assault was not merged into the felony, the killing itself, and that therefore it was not a separate and distinct felony, as was the robbery.

Those are questions of law which it is not my province to go into; but they are very important. And so you can see, gentlemen, that we have more to decide in this case simply than the one question: "Well, he killed a cop. He is guilty of robbery, therefore he must be guilty of murder."

You listen to what Judge Barshay charges you on that theory; and bear with me just a moment and see if I can assist you in proving to you—remember, I don't have to prove it—you must find all these things beyond a reasonable doubt. You must fined beyond a reasonable doubt that the robbery was in progress when Officer Ramos was shot. I do not have to prove to you that it was not. The defendant does not have to prove anything in a criminal case. You told me you would accept that law from the Court when I accepted you.

So now, let us see who can help us. I am not going to try to bore you, Mr Foreman and gentlemen of the [fol. 201] jury, with other points that would probably occur to you that I do not even mention. I am just trying to help you in this most awesome task that is yours. How can we do that? We cannot guess. We cannot wonder. We cannot surmise. We must review what has been said on the stand, that falls from the lips of the witnesses.

Remember the admonition of the Court, that anything one defendant said outside of the court at some time, any statement or another, is not binding upon the co-defendant, unless the co-defendant was present. In other words, anything Nora Elliott said in her statement, for

instance, is not binding on Jackson. It is not what Nora says here on the stand. It is only what Jackson says here on the stand that might possibly have any bearing upon her innocence or guilt.

So having conceded the robbery, he is not on trial for that here. I have conceded that he had a gun. He is not on trial for that here. Let us see.

Well, Maisy McGibbon, she tells you all about the robbery. I have written it down here. "I looked out the window," she says, "after the robbery"—after the money had been taken from her—"I looked out the window and I saw two men in the street struggling together." Is that murder?

If Nathan Jackson wilfully, deliberately, intentionally, intended to kill Officer Ramos, under the theory of murder in the first degree, in a common law murder, tell me [fol. 202] why he didn't shoot him on the street at that time?

Practically all the witnesses in the case who testified to what happened on that street, said there was either a struggle or a fight. And we must consider that in determining whether or not, in his mind, after that robbery was over, and he was making his getaway, that he intended to kill. If we have a doubt as to that, not that we may give him the benefit of it and do him a favor—no, we must under our oath give him the benefit of it and determine, "Well, if there was not premeditation and deliberation, possibly he is guilty of murder in the second degree, or manslaughter."

"I went down into the street twenty minutes later, after the officers moved away." Therefore, she cannot tell you anything about what happened down in the street.

On cross-examination, I wanted to know what kind of a robbery was this; was everybody in the place being robbed, so that the robbery might continue, and not stop? No. She said, "He robbed no one but me."

And the other witness who testified as to what took place upstairs—that we saw here the other day, said, "No one was robbed," he said, "but Maisy."

I was interest to know in my cross-examination if she heard any shots fired before the struggling and the fight-

ing. Why was I interested? Because I say it would be fair argument, that if Jackson fired shots at the police officer before he started the night with him, we might find [fol. 203] premeditation and deliberation, and intent to kill; but she says, "No, I heard no shots before the struggle." "I don't say I saw a gun in the defendant's hand when I saw him struggling." She was looking out into the street and she does not tell us he had his gun drawn at that time.

If he intended to kill this police officer; if he was premeditating on it, and deliberating on it, why wouldn't he have drawn his gun and shot him? We must consider that, gentlemen, on the question of premeditation and intent.

Well, premeditation and intent. You say it is very quick. You say this thing took only a couple of seconds perhaps. Let us see. How long was he up there in the place before any shots were fired at all, after the two or three seconds went by that she tells about? How long was he up there? How much of an interval have you got there from the time that robbery was over? Let us see what she says.

"How long was Jackson in the house with you after Nora Elliott had left the premises? How long?" "Well, he was in there for some time, Sir."

"Q. Would you say an hour? A. I would not say an hour; maybe close to an hour. It could be close to an hour." That is her testimony.

Did he therefore grab this money immediately and run out in the street? He did not, according to her testimony. And we must consider that lapse of an hour in deter- [fol. 204] mining the question of premeditation and deliberation. Nearly an hour is a long time between the robbery and the assault. That is your responsibility, gentlemen. I am simply trying to assist you as cooly and dispassionately, and as lawyerlike as I can.

Then we have Clayton Wyche. Do you remember Clayton? He was the fellow that was a barber, and used to help out up there. All he can tell us about the hold up—when we concede the robbery, is this—"When I came out, I saw the police officer lying in the street. That is all I

saw." That is all I am concerned with about his testimony.

Well, let me pass on to the next witnesses whom I think might have some bearing on the case, and that is the witness Charles Mills, formerly with the Burns Agency. He testified, I think, in the other part of the Court the other day. He says that there was a fight—this was a fight that he saw taking place between the officer and Jackson.

Now, if you wilfully and deliberately and intentionally intend to kill somebody, do you wait around and fight with him first? I say it is fair comment that you don't.

And then it may raise a reasonable doubt as to whether or not this killing that took place in a fight—not in a robbery—was not murder in the first degree, as Judge Barshay will charge you on the law.

What does he tell me here on Page 264? He is talking about the defendant. He says he was the one who broke [fol. 205] into a run with the woman.

Gentlemen, if you premeditated and you deliberate to kill somebody, do you run away from him? Of course you do not. That is the cold, hard testimony. That is not a figment of my imagination—to run away from the man, that he was supposed to have premeditated and deliberately intended to kill. Does that sound like a man who intended to kill another, when the testimony shows, on direct and on cross-examination, "I heard Jackson say, 'Don't do it.'"

Gentlemen, what does that mean? "Don't do it." Did Jackson want somebody killed there when he begs the officer, "Don't do it." This is murder, gentlemen. Remember it.

Now is there premeditation—was there premeditation and intent to kill in his mind when he says to the police officer, "Don't do it." That is the testimony.

And what happened—we want to know naturally—well, if there was deliberation—if Jackson intended to kill Ramos, he would have shot him first, wouldn't he? I should imagine so. But what does the witness say? This is still Mr. Mills. "I saw Ramos fire three times."

Gentlemen, if you hear some of this testimony—possibly it does not agree with your recollection, it is your own recollection that counts—you can always come back into the courtroom have it read back to you. I assure you that [fol. 206] I am quoting from the official minutes which the State of New York supplies to us as assigned counsel.

"I saw Ramos fire three times. He fired once after the man said something to him. Then the man fired at him."

Premeditation? Deliberation? Intent to kill? on Jackson's part? Why didn't he shoot first? You must consider it in determining the guilt or innocence of this man of this most heinous crime in our Statute books; murder in the first degree.

I was a little bit mixed up. We paid no attention to that gentlemen. Remember, he had the wrong dates. Forget about that. He admitted to me on cross-examination—I say, he was really mistaken. He said it happened on Sunday. I make nothing of that point whatsoever. I think the man was trying to tell the truth. And I believe he told the truth when he said that Ramos fired three times—and that Ramos fired first before Jackson ever fired at all. I ask you to consider that in determining what was in his mind. Is that sufficient to show intent, deliberation and premeditation?

He also tells us that the man and woman were running away from Ramos after he got up that first time. Now, I ask you again; according to his testimony—where is the intent to kill, or premeditation? You do not run away from a person that you intend to kill. Let us see what he said. I am sure I am right about this. This is on Page 268. I do not want my memory to fail me on it. [fol. 207] He tells us this—"I saw Ramos reach for his revolver, fire once; then he hesitated, and then the man fired, and then Ramos fired twice more," and so forth.

Before that, he said he had his hands on the holster of the gun, trying to draw it; and he had his hands on it; and he heard this man, Jackson naturally, say, "Don't do it; don't do it." That is the testimony, gentlemen.

A peculiar thing strikes me in this case. And no one has higher respect for the members of the great Police force of this city than your humble servant. Nobody. We have the greatest police force in the world. This young

Ramos was one of the finest policemen on the force, but doesn't it seem a bit peculiar to you gentlemen of the jury that we have not one iota of testimony in this case, that when Ramos was alerted, that something terrible had happened down the street, that he did not do as ninety-nine out of a hundred policemen would have done in the case; he did not pull his gun out. He did not have his gun out when he got down there the first time in front of the hotel. And can you imagine a policeman running to the scene of a crime of this nature without having his gun drawn? It is just an oddity, gentlemen, that I just cannot quite explain.

Sure, he saw the man running away. Sure, he saw the woman running away. What was in his mind, do you think? Do you think it would be a natural reaction on [fol. 208] Ramos' part, to pull out his gun, and at least fire up in the air, and say, "Halt; halt?" If this fellow had a gun, or there was an intent on his part to kill! No. There is no such testimony in the case.

Here you have a man and woman running away, and the police officer chasing them, without pulling his gun, or firing it. Was this a fight? Was this just a guarrel on the street between them? I say the evidence points in that direction, and I have more than one reasonable doubt as to murder in the first degree.

Well, I want too to find out how long was this fight between the hearing of the sound of the glass that attracts his attention, and so forth, until the question of the shooting. Well, he tells us, three or four minutes. That is a pretty good fight, gentlemen, three or four minutes.

I respectfully submit that if this defendant Jackson intended, premeditated, and deliberated to kill that police officer, he would not have waited and fought with him for three or four minutes.

Mr. Howland was the next witness, the taxicab man. He also heard Jackson say, "Don't do it; don't do it." And when Jackson said to him, "Don't do it," the policeman fired his gun at him, and then after asking the policeman not to fire; telling him, "Don't do it," Jackson fired.

Premeditation? Deliberation? Intent? Remember the distinction between murder in the first degree and murder

in the second degree. You might argue with me directly; [fol. 209] "What do you think he fired at him for? Didn't he intend to kill him?"

Conceding that momentarily for the purpose of this argument, I still say, you can search that record until your fingers are worn to shreds, and you will be looking in vain for one iota of testimony which shows beyond a reasonable doubt that although he may have intended to kill, that he premeditated and he deliberated upon it. Whatever happened there, took place all of a sudden.

How long do you think it took one to pull out and the other to pull out? Common sense will tell you that it only took a few seconds. You do not need to premeditate and deliberate.

I will tell you—when you premeditate and deliberate—when you commit a robbery, and the person does not stick up his hands for you—and you shoot him right then and there, in the commission of the robbery, of course, you do not have to deliberate and premeditate there. But no one was killed in this actual robbery. I say there is no premeditation and deliberation on Jackson's part, in the short interval that the two of them were fighting, according to the testimony of the People's own witnesses. It was after the defendant said to him, "Don't do it," that the officer shot him.

Well, let me see. I do not think that I need to read it to you again from the book. The officer shot the defendant, he says, before the defendant shot him. I was going to read it to you but I do not need to do it.

[fol. 210] Then Mr. Friedman is the next witness, and I am trying to hurry through just to give you this in as clear a picture as I can. What did Mr. Friedman say. Well, he says, when the policeman started to take his gun out, he also heard Jackson say, "Don't"—"and the next thing I heard was a shot." There is not much about his testimony to concern me except one little thing. I don't know.

Sometimes a jury that is prejudiced against a man charged with a crime—and sometimes you will find witnesses, not in a big important case like this, a murder case—who walk into a courtroom, and says, this is their

day in court instead of the defendant's. Sometimes they are a little bit too positive in their statements.

This was a big day for Mr. Friedman. Did these witnesses get together and go over their testimony in this case before they took the stand? I say it is fair comment that they did.

You tell me—what is the use, or what is the sense of the Judge excusing witnesses from the courtroom, so that one cannot hear what the other is saying, and then have the witnesses get on the stand, and practically parrot-like fashion tell the same kind of a story? What do I mean by that? How many times have any of you, or either of you, or any of us, ever used that word "flipped." We might use the word "trip," or "fall", "kick",—every one of them, but he was insistent on saying "He flipped him." "He flipped him." "He flipped him." And they want us [fol. 211] to believe, each one of them, that that is an expression of their own minds. No, no, I think we have a perfect right to look into it. "I just happened to use that word 'flip' on my own." Do you believe him? I do not think that three people would use that very word "flipped" at the same time, at the same place and under the same circumstances.

And you know what makes me say that, gentlemen of the jury? Because he admits to me—he admits to me on cross-examination that he was in the same room with the witnesses—with the D. A.'s—and he says he was in the room with the witnesses and the D. A.'s—and I quote—"I guess so,"—says Mr. Friedman—"I guess that is the only way we would know about the case."

Well, if he saw what happened there, and he was telling the truth, why in God's name does he have to be in a room with all the witnesses, before they go into the courtroom, talking the case over? Why does he say, "I guess that is the only way we would know about this case."

We do not want testimony of that kind although it was not so unfavorable to the defendant. It is just showing you how prejudice sometimes can sneak into a case. I suppose he is afraid that without his testimony you might find this man guilty of murder in the second degree, or manslaughter in the first degree.

Well, a very important thing you might want to know is when they were struggling, and when they were fighting. He is telling us about the two fights, you know.

[fol. 212] "Q. When you say, the defendant was struggling with him, did the defendant have any gun in his hand at that time? A. I didn't see a gun at that time, no, sir."

"Q. Now, as the officer went out, as you testified to, he did not have a gun in his hand either, did he? A. No, sir."

"And the fight started up by the taxicab?"—the fight, not the murder—the fight—"So that we now have it there were two fights, were there? A. Yes."

Is that murder in the first degree, gentlemen of the jury? Two fights? No. Of course, he is very positive, you know, stating this about three or four people pushing at the door. Do you remember that? He is positive about that.

Then he says he wants to change his testimony. He wants to change his testimony. Well, I don't know what anybody wants to change their testimony in a case for. If you are telling the truth, you do not have to change it, do you?

He states to you, "I saw the police officer trying to get into the hotel door, and then he pushed his way in, four seconds later, he came out flying out with a crowd of three or four people pushing him down the street."

Mr. Schor: What page is that?

Mr. Healy: That is at 380. "Now was that question asked, and did you make that answer?" And he said, "Well, I may have made it in the hospital."

Then you remember, after he made that statement in the hospital, he tells us he is mistaken. That was the [fol. 213] statement made right in the hospital. What was the condition of his mind then? Well, we don't know. And then his statement here,—testimony here rather—after the so-called conferences with the respective witnesses. Now, I admit I was in error when I said he said it was three or four people pushing out the door.

Mr. Healy (Continuing): "I admit," so says this gentleman under oath, "I admit that I have talked this

case over with four or five District Attorneys, and I was told a few thing that I had said." Why? This is no criticism of Mr. Schor or anything like that at all, but why does he have to be told a few things he said and then get up here on the stand and tell a different story?

Is it important? Well, it just shows the pattern, in my opinion, gentlemen, of prejudice that can arise in a case such as this, a prejudice that we, as the impartial judges of the facts, must dissolve.

Talking about witnesses who testified, Officer Rodriquez, I just wanted to find out from him—I didn't know who was going to testify and who wasn't—how many shells the officer fired. I thought the jury would like to know that, to help you. I asked him and he told us, gentlemen, that when I looked at the cylinder of Mr. Ramos's gun, I saw that two or three shells had been fired. That sort of corroborates, does it not, the testimony of the other witnesses whom I have mentioned before?

[fol. 214] I have been quite charitable to all these witnesses, and I don't want to be uncharitable to anybody in this case, but I feel I would be lax in my duty, assigned by the State of New York to see that this man gets a fair and impartial trial, if I didn't just comment on the testimony, not of the Patrolman but the testimony of the detective in the case, the big shot detective, not the Patrolman, with his gold badge on him, who says, "This is my case," in answer to the District Attorney, in the parlance of the day, "I'm carrying the case." Detective John Kaile, you remember him. What a hopping toad he is. He says that he talked to him about two a.m. The doctor tells us the operation was later—we will come to that in a minute. I ascertained that he had just been operated on when I questioned him and I learned that he had been shot twice.

Do you believe, gentlemen of the jury, that a man with the injuries that have been described to you here by the doctors and the hospital records, 500 ccs. loss of blood—do you believe him when he tells you, in my cross-examination, in an endeavor on my part to get his condition—"Oh, he was strong." Here is a fellow shot through the liver, shot through the lung. Mr. big shot detective says, "Oh, he was strong."

Imagine his physical condition. Whether it has anything to do with the guilt or innocence in this case or not, but I say let's be honest.

[fol. 215] What further does he say? He is carrying the case. Wasn't he so weak that he couldn't hardly talk? I will prove to you from Kaile's own mouth that he must have been, because the detective says to me on cross-examination—I questioned him for a few minutes about the robbery, but I did not ask him one thing about the shooting. Good God, gentlemen, that's what he is on trial here for. That's the detective, the big shot that is carrying the case, wants you to be gullible enough to believe that he, the investigating detective, wouldn't question a man about an alleged murder? You know he questioned him and you know it is fair comment to say that he was so weak he probably could never answer him. That's why he says that. He covers it up to make you believe that he was strong and says, "No, I didn't question him." What kind of a detective is that? That's his own testimony.

Tell me why he didn't question him about that shooting down there. And I think it is fair comment that he didn't, because the defendant was in such a condition that he was shot through his liver and his lung and he couldn't do it.

Why do I mention that? You listen to the charge of the Court. We have law on that proposition. If you find that a witness deliberately lied in the case, deliberately, the Court will charge, and you will take his law on it, that you may disregard his whole testimony or believe such of it as you will. The credibility of the witness is for you. I [fol. 216] think that statement of his is too far-fetched. I can't imagine, the one man in the whole Police Department who is carrying the case, doesn't ask him anything about a murder when he is on trial for it.

All right. Another reason that I—I don't know—I am too old—it isn't anger, but good God, let's be fair to him. What kind of talk is this? "Well, yes, I testified, but after lunch the District Attorney and myself go out and we have a talk," so he says. "After lunch and after that talk, I would like to state now on the stand that I was in error"—Page 493 of the testimony—"I was in error.

After talking to the District Attorney I want to say now that my questioning of Jackson was before the operation."

Oh, I don't know—what are they trying to do? Tie it all up into a knot? What difference does it make, before or afterwards? Why do they have to change their testimony after lunch and after discussions with District Attorneys? This is a murder case. A man's life hangs in the balance.

I say it just isn't quite fair.

That was about the prosecution's case. Now, I thought, gentlemen, perhaps you had a little difficulty in hearing every single thing that my client said on the stand. I know I did. I was straining and I possibly missed a couple of the words. I know when I compared these official notes to my own notes that I took down in pen and ink, there were lots of things I didn't hear him say, and I thought, if you will just bear with me only for a moment or two, [fol. 217] I would just like to read right from the record some of the things that he said in his direct and on cross-examination. I wouldn't do it, only I know I didn't catch his whole testimony.

He tells all about the robbery. I am not going to go into all that. I am not going to read all his testimony, don't worry, gentlemen; I won't bore you reading all his testimony. There are just some of the salient points there I can't catch clearly. Tis enunciation wasn't quite good. He tells me, "I went down the steps and got to the front door. Mrs. Elliott, whom I thought had gone home, approached me and she was crying hysterically, and so forth. The Patrolman noticed that and he came over and he asked what was wrong with the lady."

Was the robbery over then, gentlemen? If it was, you listen to the charge of the Court as to whether there is any felony murder in this case. Talking to the officer, not killing him, not shooting him, not firing a bullet in him as the robbery was going on. Here it is all over and he was downstairs. That takes it right out of the category of felony murder.

"I told him, 'Nothing serious. We only had a quarrel.' He asked me had there been trouble upstairs and I told him, 'No, nothing serious.' He insisted that I go with him. We talked for a while."

Is that murder in the first degree?

"We talked for a while. I told him, 'The lady is not feeling well. She is only recently out of the hospital.' [fol. 218] He reflected and he gave me permission to have her go home."

Here he is talking to this police officer down there in front. Was any robbery going on then? No, gentlemen.

Then he tells about giving her the money, the bills, whatever it was.

"The Patrolman rang the bell. No one answered, and after he rang a few times, some glass fell into the street, and he said, 'Now, I am convinced,' says the police officer, 'that there was a fight upstairs.' He tried to knock on the door, that is, the second door in the vestibule. He tried unsuccessfully and he asked me to open it for him. Together we knocked on the door. He ran up the steps ahead of me and then, instead of following him, I ran away down the street."

Ran away for what? Ran away to kill him? That's what you have got to find here, gentlemen, if you vote murder in the first degree.

"I ran away after the policeman went in." Sure, I ran away. I knew I had done wrong. I knew I had committed a robbery. And I ran down the street to get away.

Now, if it was murder in the first degree—there he has a policeman with his back turned toward him, going in the door, going up the stairs. Couldn't he have easily pulled out that gun and shot him right through the back? But he didn't. But this man, whom you are asked to convict of murder in the first degree, runs away to escape. You listen to the charge of the Court.

[fol. 219] Well, he tells about the revolver and so forth and he hears somebody say, "Please don't kill him, please don't kill him." Then he hears a second shot, he said. He saw the flame of the first and he says his gun come out and he remembers his trigger being on it. That's when the shooting took place, according to him.

Is that murder in the first degree, gentlemen? He runs away from a police officer and the police officer catches him and the police officer shoots first. Is that deliberation?

I hold no brief for him for shooting the police officer. I would be childish if I expected you gentlemen to say that I would defend any act of his for shooting that policeman. But I do say and I ask that you give it careful consideration, knowing the consequences of a verdict of murder in the first degree, that you determine when this went on, if this wasn't all in a second or two there, one pulling his gun and the other pulling his gun and the gun being shot.

We do lots of things in this world without premeditating upon them, gentlemen, and deliberating on them. That's why our great State of New York is so jealous. That's why you have these different degrees of homicide, for cases such as this, where there may be a reasonable doubt, and you have got to give him the benefit of it, and that's the law.

He tells you what happened when he got down there to the hospital. Well, he told them he was hurt. He was [fol. 220] gasping for breath, he says, breathing becoming difficult and couldn't talk very long. He says he doesn't remember talking to any detectives or anybody. Well, maybe he does and maybe he doesn't. I don't know, gentlemen. That's your responsibility.

He remembers questions and he remembers some answers being made to them. Then he says to me, his own lawyer,—"Now, you admit you went into that hotel to rob it; is that right?" And he says, "Yes, and when I came out on the street I was all through with that robbery. It was all over."

"Q. Was this robbery over when you came out of that hotel before you met this policeman on the street? A. Yes. The officer knew nothing of the robbery."

Well, then in his cross-examination, a brilliant cross-examination by my very good friend—I must say to you now, I want to pay my compliments to him, gentlemen. This is not affectatious, either. We ought to be proud that we have a young man like this representing you and me as an Assistant District Attorney. He has a job to do in the case. He tried to do it fairly and impartially. I only wish some of these big shot cop, detective "carriers," with their gold badges, were as fair as he is. Yes.

I don't need to tire you with this, gentlemen. He tells again practically the same on cross-examination. If you want any of it read, as I said before, you can have it. But it must be tiresome. You have been so patient with me now that for me to repeat all of these things.

[fol. 221] Well, of course, there is some talk about going over to New York, over there to Central Park, up and down. He says he went there. She says he didn't. I don't know whether they are mixed up in their dates, the morning before, the night before, or not. Any way, what does that do, gentlemen, to help us in determining this murder case, whether they went to Central Park or they didn't? How many drinks they had or how many drinks they didn't have? Well, that just affects his own mind. Possibly under certain circumstances, but that is for you to determine, his physical condition, when the shooting took place. I know the District Attorney didn't permit us to forget it, when I put him on the stand. Remember, I didn't have to put him on the stand. There is no duty of him going on the stand, gentlemen. I did. I thought the District Attorney was going to ask him about being convicted of attempted burglary in the third degree as a part of his cross-examination. He just was so busy, I suppose, he did forget, but then he went back. There is no question about it. Sure, he was convicted of attempted burglary in the third degree, and as he told Judge Barshay at the time, I don't want to hide that from you. You probably would never have known about it if I didn't put him on the stand, but I wanted you to hear everything in the case. This was his day in court. The mere fact that he has been convicted once before for attempted burglary in the third degree, as you will be charged by [fol. 222] the Court, is no evidence that he is guilty of murder in the first degree in this case. The Judge will tell you how you may consider it in determining the weight and credibility.

Well, Nora, I don't want to say anything about her. She has a brilliant lawyer to defend her. There is only one thing. She said something in a statement which isn't binding on him, but never mind what is in the statement. It is in the evidence that is here, this is what counts.

"I don't know who said, 'Hit him,' although I said in the statement that it was Nathan." What she said in the statement, gentlemen, is not binding upon him. The law tells you that. What she says when he isn't present or what he says about her, this is what counts up here on the stand, and on the stand she swears, "I don't know who hit him."

That was the case and then rebuttal came along, gentlemen, you remember. Well, I have seen doctors and doctors in my life, physicians, surgeons, interns, of all types and shapes, but this little fellow Suarez, who got up there on that stand—I don't know—he didn't impress me. That is fair comment. Demorol, atropine, was operated on at five. He was given demerol at 3:55. Lost 500 cc.'s of blood. That's something, gentlemen. The operation starts at five and it ends at eight. What do you think his condition was, if he needed an operation of that length of time?

[fol. 228] And then this little doctor tells me, under oath, he says there is no difference in a healthy man and in a man who is shot through the liver and shot through the lung, as far as this demerol is concerned. Do you believe that? Do you believe that demerol would have the same effect on a healthy person as it would on him in his physical condition? I don't, and I say it is fair comment. What difference does it make, you say, about the case, except I just don't like this idea of everybody trying to put a nail in his coffin.

What is he so interested in giving testimony of that kind? What kind of doctor is he to say that? Well, I had to go at him in cross-examination in a murder case. It was like pulling teeth to get evidence from him. He wouldn't admit to me in cross-examination until Judge Barshay had to step in. He wouldn't admit to me that anesthesia was given. You remember that. Why? Well, I don't know. That's not for me to comment. He finally did, when the Judge asked him a question which probably struck a responsive cord in his mind or his heart, if he has got any. How silly it would be that they would operate on a man for three hours with the 500 cc.'s—shot through the liver and through the lung, and he

doesn't know whether anesthesia was given to him. What kind of testimony is that?

Sure, go ahead, convict him. He is no good. He is a bum. He has been in trouble before. Hurry up and get it over with. What difference does it make what we say [fol. 224] about him on the stand? You are blue ribbon jurors, and thank God you are. You are blue ribbon jurors selected instead of common jurors, because of the intricate questions of law which you are going to hear and which I have confidence that you will apply to the evidence; whether or not an ordinary jury could be able to do so, I don't know. If there ever was a time in my life where I wanted a blue ribbon jury, it is in a case like this, because gentlemen, regardless of what this detective with his gold badge on him wants, or this little doctor, you are the ones and you give the weight and credibility to testimony of that kind sufficiently as you believe it. Never mind what my personal opinions are. I don't like this case to be tried on atmosphere. Your responsibility is an awesome one, and so is mine. I could stand up here in front of you and say, "Sure, I am a lawyer." I could fool around here and hurry up and get through with this summation and let it go, but thank God that I couldn't do it. When I took my oath, just as you took your oath, it was to defend my fellow man and see that justice was done to him, and all I ask of you gentlemen is that you try to consider his case as carefully in your determination as I have tried to do it in my presentation.

I could be a Suarez or I could be a Kaile, and say, "Oh, get rid of the bum, he is no good. He killed a cop." I can't do it. I couldn't go home and rest my head on my pillow tonight if I tried the case that way, and I know [fol. 225] that you gentlemen won't do it, because I have confidence in your promise to me that you wouldn't fool me. I hope to God I haven't made a mistake. It is my responsibility if there is anybody on this jury that feels the way that Suarez does and that big fat detective.

This is your case now, gentlement. You have been more than patient to me, more than patient to me. That is the last you will hear of me. I suppose you will be glad of it. There are only three times, you know, we are permitted

to talk to you during the trial. The first time is when the jury was selected; the second time was when counsel had an opportunity to open. We waived it. The third time is now. I can't talk to you any more, but I remember the first time I talked to you and I remember your answers to me, that you would give him a fair and impartial trial, you would take the law from the Court: That's all I ask for, gentlemen.

Now you have heard me address you. It is true Judge Solovei will speak, and then the District Attorney. We haven't tossed up a coin to see who speaks first or who speaks secondly. That is the law. Counsel for the defense must sum up to you first, and then the District Attorney.

Remember, gentlemen, your verdict must be unanimous, and remember, you need only one—just one reasonable doubt, Mr. Foreman, just one. I have kept a record here and I have tried—I don't know whether I have succeeded or not—I have tried to give you sixteen reasonable doubts [fol. 226]—fourteen and two extra ones. You only need one, not that I may find him guilty of murder two or manslaughter one, but if you have a reasonable doubt as to his guilt of murder in the first degree, you must give him the benefit of it, if those doubts are in your mind.

There is no question about it. All right. I don't know, I look at him there. God, he is pretty tough. I looked at that neighborhood up there, too, when we went up the other day. I don't know, I was brought up myself in a neighborhood probably not much better than that down in Boston, where I was born, but I am afraid—I am afraid —that's all I am afraid of in this case—that the words "Bedford-Stuyvesant" may mean something to you. It has nothing to do with this case. Somebody may say, "Oh, this is Bedford-Stuyvesant, that's that terrible neighborhood. We have got to stamp out crime."

Mr. Foreman and gentlemen of the jury, you are not a vigilante committee to stamp out crime in the Bedford-Stuyvesant section or any other section in Brooklyn. Please don't let that neighborhood prejudice you. Don't let his mere looks prejudice you.

This is a great country, isn't it? Isn't this a great country? Here I am, an old timer, ready to go over the

sunset of life, assigned to defend an indigent man not of my own color, my own creed, to do the best I can, from my years of experience. In what other country could he have the opportunity to have the assistance of such [fol. 227] brilliant associates as mine, Mr. Fontana, Mr. Kramer, sitting here with him. It makes you feel good, doesn't it, to think that we are all equal in this country. He is entitled to just as fair a trial in this case as anyone that ever entered the portals of this great County Court charged with murder, whether it was a police officer who was killed, or whether it was an arch-criminal who was killed, or whether it was a reputable business man who was killed. He is entitled to his day in court, and you saw it.

I say to you in conclusion, you saw what dignity this distinguished jurist, who is Judge of the Law, has conducted himself with in this trial. He is the Judge of the law. That's why we are proud of a Judge of that type. You are judges, too, each one of you, just as important as Judge Barshay. You are judges of the facts, and all I ask of you is, try and make of him a model after which you will mold your actions when you go into that jury room, so that you can do justice. No prejudice on his part. He has ruled right down the middle, fair to everyone, the great State of New York, and also fair to this defendant. You do so and I will be satisfied.

I know what would happen to him if we had mob rule here. If a thing like this happened, a police officer was killed, he wouldn't be here, would he? No, sir.

My last word in this case, I can't help but remind you —they say a sign of getting old is when you remember things that happened when you were a little boy. I guess [fol. 228] that's right. You talk about the past. I remember the first little declamation I ever heard up there in New England near Plymouth Rock—you know, where the Mayflower landed. We learned it by rote and by heart, and I think we might remember it in this case, all of us, when we say we will decide it on the law and the facts, without sympathy or prejudice, our forefathers, in writing that declaration, said, "Resolved"—in the cabin of the Mayflower—"Resolved, that this shall be a government of laws and not a government of men."

You take the law in this case, not your own personal opinion as a man, and I am confident, Mr. Foreman, when you return to this courtroom and the query is propounded to you as to how do you find the defendant Jackson, guilty or not guilty, you will say either guilty of murder in the second degree or manslaughter in the first degree.

Thank you.

The Court: Mr. Foreman and gentlemen of the jury, you are to go to lunch now and return at 2:30. Again I charge you, keep an open mind. Judge Solovei is to sum up and Mr. Schor is to sum up, and the Court is to give you the law. Do not discuss the case. Permit no one to talk to you about it or of it in your presence or hearing. Do not read the press. Do not discuss it during the lunch hour, no phase of it. You will come back here at 2:30, at which time counsel for Elliott will sum up.

Everybody remain seated.

* * * *

[fol. 229] Brooklyn, New York
October 13th, 1960

(Jurors return; roll called; trial resumed.)

CHARGE OF THE COURT

* * * *

[fol. 230] The Court:

I have charged you during the trial, and I charge you again that the statement so offered, is to be considered only with respect to the defendant Jackson.

I shall now give you the aplicable law concerning such statement which the District Attorney claims is a confession on the part of Jackson, or an admission of Jackson.

Jackson testified he was shot. He was under a sedative. He said he was refused water unless he answered the questions as they wanted him to answer them. He said he remembers some questions and answers, and denied others. He had no recollection as to some questions and answers. He said that the statement which the Dis-

trict Attorney claims to be a confession was obtained from him in violation of law. You have heard all the testimony on that point, as well as on every other point. Now let me give you the law.

A confession of a defendant, says the law, whether in the course of a judicial proceeding, or to a private person, can be given in evidence against him unless made under influence of fear, produced by threats, or unless made on a stipulation of the District Attorney that he shall not be prosecuted therefor. Of course, in this case, there is no claim that the District Attorney made any such stipulation, so do not be concerned with that part of it.

Under our law, a confession is not sufficient to warrant a conviction without additional proof that the crime charged has been committed. I will subdivide the two parts of the law. I will give you the first part first.

What does the law mean when it uses the word "confession"? It has been defined as an accurate and true [fol. 231] statement made by a person declaring that he, the person, committed or participated in the commission of the crime charged.

The form of the confession is immaterial. It can be written. It can be oral. It may be signed, and it may be unsigned. It may be in question and answer form. It may be in detailed form, or it may in answers to questions put to him. There is no exact form that the law requires a confession to be in.

If you determine that it was a confession, the statement offered here, and if you determine that Jackson made it, and if you determine that it is true; if you determine that it is accurate, before you may use it, the law still says you must find that it is voluntary, and the prosecution has the burden of proving that it was a voluntary confession. The defendant merely comes forward with the suggestion that it was involuntary; comes forward with proof that it was involuntary, but the burden is upon the prosecution to show that it was voluntary.

Under our law, a confession, even if true and accurate, if involuntary, is not admissible, and if it is left for the jury to determine whether or not it was voluntary, its decision is final. If you say it was involuntarily obtained,

it goes out of the case. If you say it was voluntarily made, the weight of it is for you. So I am submitting to you as a question of fact to determine whether or not (a) this statement was made by Jackson, or allegedly made by Jackson, whether it was a voluntary confession, and whether it was true and accurate. That decision is yours.

Should you decide under the rules that I gave you that it is voluntary, true and accurate, you may use it, [fol. 232] and give it the weight you feel that you should give it. If you should decide that it is involuntary, exclude it from the case. Do not consider it at all. In that event, you must go to the other evidence in the case to see whether or not the guilt of Jackson was established to your satisfaction outside of the confession, beyond a reasonable doubt.

If you should determine that Jackson made this confession, and that it was a true confession, and you have so determined from the evidence, then if you should decide that it was gotten by influence, of fear produced by threats, and if that is your decision, then reject it.

I repeat to you again, the burden of proving the accuracy, truth, and the voluntariness of the confession always rests upon the prosecution.

The second part of Section 392, referring to confessions is as follows. It is not sufficient to warrant a conviction without additional proof that the crime charged has been committed.

This means, gentlemen, that you must be convinced beyond a reasonable doubt that exclusive of the confession, the crime charged has been committed. The additional proof outside of the confession does not have to show that it was committed by the defendant, but that the crime charged has been committed by someone. In other words, there must be proof independent of the defendant's confession, if you accept it, that the crime charged was committed by some one.

Consider the testimony of all the witnesses in the case. Do you believe, and it is up to you to believe or to disbelieve the testimony, that they saw the defendant Jack-

son, irrespective of what Jackson says, shoot and kill the policeman Ramos.

* * * *

[fol. 233] Detective Dudley testified that he took the defendant Elliott into custody at 446 Classon Avenue as she was going into the building. She said she did not live there. He took her to the precinct, and turned her over to his superiors. He found no money on her. This was on June 14th, at nine A.M.

Detective Kaile testified that on June 14th, 1960, pursuant to a call, he went to 1124 Fulton Street about 1:30 A.M. Ramos had already been removed to the hospital. He then went to the Cumberland Street Hospital; in the X-ray room he saw Jackson. Jackson told him that he shot a colored cop; that he got the drop on him; that he was with Nora; that he had met her at the "722 Club" on three or four occasions, and this was the first time he went out with her; and that he had known her for a month.

The officer said he left Cumberland Street Hospital, and returned in twenty minutes, and resumed his talk with Jackson, who said that he had gone to the hotel with Nora; that she signed the register as he told her to. The woman in the hotel knew him. He pulled his gun and said "Stick up." He got the gun from "Smokey" who hung out on Greene Avenue; that he went to the 79th Squad, from where he took the defendant Elliott, to the 80th Precinct. She said that she and Jackson went to the hotel; that she signed in; that she knew Jackson [fol. 234] for eight months; that she was tired and went to the hotel for sleep. They got into a cab outside the hotel. She did not see the cop. She picked up the stick, at which time Jackson said, "Hit him"; but that she did not hit him. She dropped the stick. She does not know if she swung the stick. She does not remember. She heard a shot, and then left the scene.

The officer then testified that he went to the Cumberland Street Hospital at about 3 A.M. He there saw Jackson and spoke to him. Jackson said that Elliott was with him; and that at that time Elliott was faced

with Jackson, and Jackson with Elliott, and each identified the other.

The officer further testified that he got the night-stick of Ramos from the Lieutenant and he placed it in the property Clerk's office.

He was cross-examined and said that the first talk with Jackson was at 2 A.M. in the X-ray room where Jackson was lying on his side. He saw Jackson wheeled in. Jackson was shot two times in the abdomen. Jackson made a statement to the District Attorney about 4 A.M., but the detective was not present. Jackson told him, "when he saw the lady knew him, he, Jackson, decided to commit the stick-up." That ended the cross-examination by Mr. Healy.

On re-direct examination, he said that Assistant District Attorney Postal questioned Jackson. When Elliott was questioned by the Assistant District Attorney, he was present.

Detective Rorke testified that he is attached to the Ballistics Bureau of the Police Department of the City of New York, and that on June 14th, 1960, he went to the Cumberland Street Hospital; that he there received a revolver from Detective Keenan, and took it to the Bal-
[fol. 235] listics Bureau, where it was tested by firing four shot from the gun; that he turned the bullets over to Detective Burke for comparison purposes.

Detective Kaile was recalled, and he said the first time he spoke to Jackson was at the Cumberland Street Hospital about 2 A.M. and before Jackson was operated on.

Detective Burke testified that he is attached to the Ballistics Bureau of the Police Department; and he gave his qualifications. He said he conducted comparison tests between the bullet taken from the body of the deceased, Ramos, and the bullets fired by the Ballistics Bureau detective, and in his opinion he said the gun in evidence fired both bullets. This gun had nine shells. The convention gun has five or six.

Vito Lentini testified that he is a stenographer attached to the District Attorney's office; that he took the question and answer statement of the defendant Jackson at the Cumberland Street Hospital, and that he transcribed it,

compared it and found it accurate. It was then read to the jury.

He was cross-examined, and he said that the statement commenced at 3 A.M. and ended at 4 A.M., and the questions and answers were continuous, he said. There were police and hospital personnel around the bed of the defendant; and even when he said, "I can't go on," the Assistant District Attorney Postal repeated the question and the defendant Jackson answered.

That ended the cross-examination by Mr. Healy.

That ended the People's case.

The defendant Nathan Jackson took the stand in his own behalf. He said he was born in Texas; is single, and has been living in Brooklyn since 1950. Before that, [fol. 236] he was employed as a clerk in the laundry at the Brooklyn Hospital; that he met the defendant Nora Elliott at a quarter to one in the morning on the day in question; that they went to the I. C. U. Hotel; that earlier that night they had gone to several places together, and were drinking; that prior to meeting Elliott he had been drinking with his brother, and between them they had consumed a fifth of whiskey; that he went to the hotel to get a room because he was tired from drinking and being out. When he and the defendant Elliott entered the hotel, they went up to the second floor, and Miss Elliott went to register, and he went into the alcove. The clerk, Mrs. McGibbon said that he, Jackson, should register, and he said it was all right for Elliott to do so. He sat in the alcove with his head in his hands. Mrs. McGibbon asked him what is wrong. He said, "Nothing is wrong." He said he was tired.

[fol. 237] She denied seeing the hold-up, and knowing it was to take place. She saw no revolver, nor was she told about the hold-up. There was no hold-up in her presence.

She was cross-examined by Mr. Schor, and she testified that on June 13th she slept from 8:30 P.M. to 12:30 the next day; that the co-defendant woke her up; that they went to a hotel; that they did not go to the shooting gallery at 42nd Street; that they did not go to Central Park. She said she began her drinking a little before lunch of the previous day. She did not hear Jackson say, "Go

downstairs"; that she didn't give the Clerk any money. In the statement to the District Attorney, she said, "Nathan said, 'hit him,' but I didn't."

Dr. George Suarez testified that he is a physician attached to the Cumberland Street Hospital, and was on duty the night of the occurrence, June 15th, 1960; that neither he nor any one else in his presence told the patient, the defendant Jackson, that he could not get any water [fol. 238] unless he answered the questions as they want him to, and that he cannot be alone unless answers the questions; and that the anesthesia was administered at 5 A.M., and the operation concluded sometime thereafter.

On cross-examination he testified that the patient was given Demoral to relieve the pain. It makes one dopey or sleepy. It was given at 3:55 A.M. He was given another medication to dry up the sputum; that it manifests itself, the Demoral, in about fifteen minutes, and that with a person that was shot through the liver, the difference in which the Demoral maifests itself is not much.

Rubin Colbert testified that he is a Nurse's Aide at the hospital, and that neither he nor anyone else in his presence told the defendant Jackson that he could have no water unless he answered the questions as they wanted him to; and that the hospital regulations do not permit the giving of water or anything by the mouth unless on Doctor's orders, to any pre-operative patient.

Inez Smith testified that she is a practical nurse of that hospital, and she was present on the night of the alleged occurrence. She testified substantially the same, denying that any such thing was heard by her, as testified to by the defendant Jackson. She too testified to the rule about giving no water to any pre-operative case.

On cross-examination, she said that both she and Colbert were asked, "Did Jackson ask for water?" and the answer was, "Yes, but they did not give it to him." Then she explained the reason.

Saul Postal testified. He is the Assistant District Attorney who conducted the questioning of the defendant Jackson in the hospital. He gave testimony substantially [fol. 239] to the same effect, and nowhere in his questioning did he say to the defendant Jackson that he could not

have any water or he could not be left alone unless he answered the questions as they wanted him to, nor did he hear any one in his presence say that.

* * * * *

[fol. 240]

REQUEST TO CHARGE-EXCEPTION

The Court: And I read another part in connection therewith, Section 390, which provides that, "when it appears that a defendant has committed a crime and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of [fol. 241] those degrees only." I said that too.

Mr. Healy: I did not hear you say that.

The Court: I read that from my charge.

Mr. Healy: All right. I have one more request. On the question of the validity of the alleged confession or statement of Jackson, your Honor charged, I believe properly, as to what it says on the statute books, as to when a confession may be considered voluntary. I have no exception to that, but I do ask your Honor to go further and say in deliberating whether or not Jackson's confession was voluntary, they had a perfect right to take into consideration at the time it was made, his physical condition in determining the voluntary nature.

The Court: I think I included all the circumstances then present; that he was under sedation, Judge Healy. I said, "Jackson testified he was shot; and he was under sedation; that he was refused water unless he answered the questions as they wanted him to." I have already covered that subject matter and I decline to charge further as requested.

Mr. Healy: My exception is although you quoted perfectly, in my opinion you left the impression with the jury that the only time they could consider whether the confession was voluntary or not, was whether for instance as you read, and you did read this part, that the District Attorney made a promise to him, or that the confession was given under fear. I say in this case, in justice to this defendant, not only where a promise is made to him or

that he was in fear, as your Honor correctly read from the Statute, but this jury had a perfect right to take [fol. 244] into consideration his physical condition.

The Court: I did exactly that.

Mr. Healy: I respectfully except to your Honor's refusal to so charge. I think that is the law.

The Court: Judge Solovei, you have given me many requests to charge.

Mr. Solovei: Yes, your Honor.

The Court: Mark this as an exhibit.

* * * *

[fol. 245]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 246]

SUPREME COURT OF THE UNITED STATES

No. 778 Misc., October Term, 1962

NATHAN JACKSON, PETITIONER

vs.

WILFRED DENNO, WARDEN

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—January 21, 1963

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 764.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 62

NATHAN JACKSON,

Petitioner,

v.

WILFRED DENNO, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

DANIEL G. COLLINS
New York University School of Law
40 Washington Square South
New York 3, New York
Attorney for Petitioner

INDEX

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 62

NATHAN JACKSON,

Petitioner,

v.

WILFRED DENNO, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

Summary Statement of the Case

Petitioner, Nathan Jackson, was indicted by the grand jury of Kings County, New York, for the crime of murder in the first degree. On trial in the County Court of Kings County, the prosecutor introduced into evidence a confession made by Petitioner to an assistant district attorney of Kings County. At the time of this confession, Petitioner was hospitalized awaiting an operation for bullet wounds in the liver and lung (R. 13-15, 113-15). He had lost a considerable amount of blood (R. 15, 19, 115, 120) and, immediately prior to this confession, had been given doses of the drugs demerol and scopolamine (R. 17, 18). Petitioner had also been refused water (R. 65, 105, 114, 123-29).

Petitioner's trial counsel, after hearing testimony concerning the use of drugs, objected to the use of Petitioner's confession (R. 20, 27). The trial judge did not exclude the confession but rather, in his charge, instructed the jury that they were the arbiters of the question of the confession's voluntariness. If they found the confession to have been involuntary they would, they were instructed, have to disregard it and convict, if at all, only on the basis of other evidence in the record (R. 21-22).

The jury found Petitioner guilty of first-degree, premeditated murder, and the trial judge imposed the then mandatory sentence of death. The New York Court of Appeals affirmed Petitioner's conviction without opinion, 10 N.Y. 2d 780, 177 N.E. 2d 59 (1961), and denied his motions for reargument. 10 N.Y. 2d 885, 178 N.E. 2d 234 (1961), 11 N.Y. 2d 798, 181 N.E. 2d 854 (1962). The New York Court of Appeals granted Petitioner's motion to amend the remittitur to indicate that, in reviewing the question of voluntariness of Petitioner's confession, it had passed on questions under the due process clause of the Fourteenth Amendment to the Constitution of the United States. 10 N.Y. 2d 816, 178 N.E. 2d 234 (1961). This Court denied certiorari, 368 U.S. 949 (1961), and Mr. Justice Harlan denied Petitioner's request for a stay of execution in order to file a second petition for certiorari. 82 Sup. Ct. 541 (1962).

Petitioner filed the habeas corpus petition which is the basis for the present action in the United States District Court for the Southern District of New York. In considering the petition, the District Court heard oral argument, accepted briefs, and reviewed the entire New York record on appeal. The District Court refused to accord Petitioner a hearing and denied his petition, with an opinion. 206 F. Supp. 759 (S.D.N.Y. 1962) (R. 2-9). Subsequently, the

District Court certified that there was probable cause for an appeal and granted Petitioner's motion to appeal *in forma pauperis* (R. 1). The District Court's denial of the petition was affirmed, with an opinion, by the United States Court of Appeals for the Second Circuit. 309 F. 2d 573 (2d Cir. 1962) (R. 24-32).

Thereafter Petitioner filed in this Court a motion for leave to proceed *in forma pauperis* and a petition for certiorari. On January 21, 1963, this Court entered an order in the present case granting the motion for leave to proceed *in forma pauperis* and granting the petition for certiorari. 371 U.S. 967 (1963) (R. 162).

Opinion Below

The order of the United States Court of Appeals for the Second Circuit affirming the order of the United States District Court for the Southern District of New York denying Petitioner's application for a writ of habeas corpus appears as *Jackson* v. *Denno*, 309 F. 2d 573 (2d Cir. 1962) (R. 24-32), affirming 206 F. Supp. 759 (S.D.N.Y. 1962) (R. 2-9).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

Constitutional and Statutory Provisions Involved

This appeal involves Section 1 of the Fourteenth Amendment, U.S. Const., and the hearing provisions of the Judiciary Article pertaining to habeas corpus proceedings, 28 U.S.C. § 2243. These provisions are set forth in the Appendix *infra*.

Questions Presented

I. Does a state criminal procedure which leaves solely to the jury the factual determination of the voluntariness of a confession violate the Fourteenth Amendment and thereby vitiate a conviction? Should *Stein* v. *New York*, 346 U.S. 156 (1953), be overruled?

II. In the present case, was Petitioner's confession involuntary as a matter of law, and did its admission into evidence therefore vitiate his conviction?

III. In the present case, did the refusal of the courts below to accord Petitioner a hearing on his application for a writ of habeas corpus deprive Petitioner of his rights in violation of the federal statute governing such matters? Does *Townsend* v. *Sain*, 372 U.S. 293 (1963), require a hearing in the present case?

Summary of Argument

This case presents the issue whether *Stein* v. *New York*, 346 U.S. 156 (1953), should be overruled. The New York criminal procedure sanctioned by that case—which allocates to the jury rather than the trial judge the function of determining the voluntariness of a confession, and which thus permits the conviction of criminal defendant despite the introduction into evidence of a confession which the jury may find to have been coerced—is totally at odds with the Constitutional antagonism toward involuntary confessions that has long been recognized by this Court. The *Stein* case, which sanctioned such a procedure, is an aberration in this Court's development of consistent, Constitutional protection of criminal defendants in state courts, and should be overruled forthwith.

This case also presents the question whether Petitioner's confession was involuntary as a matter of law and must therefore vitiate Petitioner's conviction. The confession was involuntary in that it was obtained by the prosecutor's taking advantage of Petitioner at a moment of extreme misery and degradation.

If the complete relief which Petitioner seeks should not be available, he should nevertheless be accorded a hearing on the merits of his habeas corpus application. The present case presents a situation in which, in the words of this Court in *Townsend* v. *Sain*, 372 U.S. 293, 313 (1963), "material facts [concerning voluntariness] were not adequately developed at the state court hearing." These facts concern the effect two drugs—demerol and scopolamine—had on Petitioner's ability to resist interrogation.

ARGUMENT

I.

The Fourteenth Amendment Requires That the Judge in a State Criminal Trial Determine as a Matter of Fact Whether a Confession Is Voluntary and, if It Is Not, Exclude It From the Evidence Presented to the Jury.

A pillar of the due process protection afforded criminal defendants in state courts is the Constitutional abhorrence of involuntary confessions. Application of the principle, first recognized in *Brown* v. *Mississippi*, 297 U.S. 278 (1936), that an involuntary confession admitted into evidence vitiates a state conviction, has through the years received considerable attention from this Court. We know today that the basis for this rule is that "the methods used to extract [involuntary confessions] offend an underlying principle in the enforcement of our criminal law: that ours

is an accusatorial and not an inquisitional system. . . . " *Rogers* v. *Richmond*, 365 U.S. 534, 541 (1961).

It is then surprising that this Court rendered the decision that it did in *Stein* v. *New York*, and, indeed, more surprising that the decision should still stand. It is true that the extreme interpretation that the dissenting members of this Court in the *Stein* case feared might be given to that decision has not materialized. *Stein* v. *New York*, 346 U.S. at 199-206. We know now that *Stein does not* stand for the proposition that a conviction will stand despite the introduction of a coerced confession if there is sufficient other evidence; on the contrary, nothing will save the conviction if the admitted confession was involuntary as a matter of law. *Lynumm* v. *Illinois*, 372 U.S. 528 (1963); *Spano* v. *New York*, 360 U.S. 315 (1959); *Payne* v. *Arkansas*, 356 U.S. 560 (1958). This Court has, however, in dictum indicated that *Stein* remains a viable precedent for permitting the submission to a jury of any confession concerning which voluntariness is a fair question of fact. *Spano* v. *New York*, 360 U.S. at 324.

If *Stein* v. *New York* has not proven to be as destructive of the exclusionary rule as many had feared, it nevertheless is still not possible to reconcile that case with a developed principle of due process in state criminal proceedings. This is so because there can be no valid Constitutional distinction justifying different treatment of confessions that are involuntary as a matter of law and confessions that are involuntary "merely" as a matter of fact. Moreover, it defies human experience to expect limiting instructions to prevent a jury in its determination of guilt to be uninfluenced by the existence in evidence of a confession which it in fact finds to have been involuntary. Nor, for that matter, is it reasonable to believe that the jury's determination of the question of a confession's voluntari-

ness will not be swayed by any other evidence of the defendant's guilt.

A compelling reason for overruling *Stein* v. *New York* is that it attempted to restrict the basis for the exclusionary rule to considerations of evidentiary reliability. 346 U.S. at 192. This was a calculated departure from this Court's earlier unwillingness to permit a conviction to stand upon an involuntary confession even when the conviction was reliably buttressed by sufficient other evidence. *Brown* v. *Allen*, 344 U.S. 443, 475-76 (1953); *Malinski* v. *New York*, 324 U.S. 401 (1945). And now this Court has made it abundantly clear that *Stein* erred in this respect; the rationale for the exclusionary rule is not the untrustworthiness of evidence obtained involuntarily but rather the "impermissible methods" used to obtain such evidence. *Rogers* v. *Richmond*, 365 U.S. at 540-41; *Mapp* v. *Ohio*, 367 U.S. 643, 656 (1961). This development would seem concomitantly to demand the exclusion from evidence of any confession that is, as a matter of fact, involuntary. It defies logic and consistent application of Constitutional principle to exclude confessions that a judge regards as "obviously" involuntary while admitting those that he would, if he were asked, characterize as "factually" involuntary.

The *Stein* aberration has been very severely criticized in the legal literature on the ground that it does not satisfy the Constitutional requirement of due process. See Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. Chi. L. Rev. 317 (1954). By its terms this criticism is equally applicable under the restrictive meaning that *Stein* has been given by this Court's decisions in *Payne* v. *Arkansas*, *supra*, and *Spano* v. *New York*, *supra*. Professor Edmund Morgan has stated that:

"The case of a confession induced by physical or mental coercion deserves special mention. The protection which the orthodox rule or the Massachusetts doctrine affords the accused is of major value to him. A fair consideration of the evidence upon the preliminary question is essential; in this consideration the truth or untruth of the confession is immaterial. Due process of law requires that a coerced confession be excluded from consideration by the jury. It also requires that the issue of coercion be tried by an unprejudiced trier, and, regardless of the pious fictions indulged by the courts, it is useless to contend that a juror who has heard the confession can be uninfluenced by his opinion as to the truth or falsity of it. Neither the due process clause of the Federal Constitution nor any other of its provisions requires any particular division of function between judge and jury. The result is that in New York and in a few other jurisdictions, the orthodox rule has been abandoned in the one situation where it is most needed. The rule excluding a coerced confession is more than a rule excluding hearsay. Whatever may be said about the orthodox reasoning that its exclusion is on the ground of its probable falsity, the fact is that the considerations which call for the exclusion of a coerced confession are those which call for the protection of every citizen, whether he be in fact guilty or not guilty. And the rule of exclusion ought not to be emasculated by admitting the evidence and giving to the jury an instruction which, as every judge and lawyer knows, cannot be obeyed." Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* 104-05 (1956).

A Constitutionally adequate rule for determining the admissibility of an allegedly coerced confession must invest the trial judge with the responsibility for making a factual determination of admissibility, out of hearing of the jury. The question whether or not thereafter, in the event of a finding of admissibility, the same factual question should be submitted to the jury does not, in counsel's opinion, rise to a Constitutional issue. However, this Court should know that there is at least one expert who has concluded that the apparent added protection for an accused from the so-called "Massachusetts" variant of the orthodox rule—which requires the jury to be given a "second bite" at the issue of voluntariness—is really illusory. The Massachusetts variant, he has argued, makes it not unlikely that the trial judge will avoid difficult factual questions concerning voluntariness by passing them to the jury, and thereby cause the same deprivation of due process that now exists when the New York procedure is followed. Meltzer, *supra* at 329-30.

There is no reason to believe that holding the New York procedure unconstitutional would have any but a salutary effect on the administration of criminal justice. While the "New York" procedure is today followed in a substantial number of jurisdictions, it has not by any means secured overwhelming acceptance. Nor has it been approved by leading authorities on the law of evidence. An impressive array of such authorities have in fact taken the position that, given the exclusionary rule, the factual question of voluntariness should logically be for the judge. 3 Wigmore, *Evidence* § 861 (3d ed. 1940); McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 Texas L. Rev. 239, 251 (1946); Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv. L. Rev. 165-89 (1929).

Moreover, the National Conference of Commissioners on Uniform State Laws has adopted the exclusionary rule and would have the judge alone apply it. National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence, rule 8 (1953).

II.

Petitioner's Confession Was Involuntary as a Matter of Law.

Although the earliest involuntary confession case in which this Court voided a state conviction involved the use of brute force, *Brown* v. *Mississippi*, 297 U.S. 278 (1936), the proscribed conduct in other cases has consisted of less barbarous, but no less effective, forms of pressure: For example, false sympathy, *Spano* v. *New York*, 360 U.S. at 323; deprivation of clothing, *Malinski* v. *New York*, 324 U.S. at 405-07; isolation and persistent questioning, for five hours, of an unrepresented adolescent, *Haley* v. *Ohio*, 332 U.S. 596, 599-601 (1948); and use of a psychiatrist, *Leyra* v. *Denno*, 347 U.S. 556, 559-62 (1954).

The circumstances under which Petitioner's confession was taken by the assistant district attorney were as degrading and coercive as any of those described above. Petitioner, lying in a hospital bed, had been severely wounded only a few hours earlier (R. 35, 39, 51) and was shortly to undergo a life-saving three-hour operation (R. 14, 115). He had lost a considerable amount of blood (R. 19, 120), was having trouble breathing (R. 65) and, for whatever reason, had been deprived of water (R. 66, 123-24). He apparently faced the interrogators who stood over him (R. 58-59) without assistance from any quarter —the trial record being devoid of any indication that he

had with him friend or counsel or had been advised of his legal rights.* The failure of the record to show these facts is very significant, since Petitioner had earlier given a confession to a police detective, and it was the police who then caused the assistant district attorney to come to the hospital room in which Petitioner was confined (R. 34-44). Petitioner was thus for all intents and purposes "an accused" at the time of his interrogation by the assistant district attorney. Given these facts, it is difficult to understand how the prosecution could have begun to meet its burden of proving voluntariness without showing that Petitioner had some impartial assistance during his interrogation. Cf. *Haynes* v. *Washington*, 373 U.S. 503, 516-17 (1963).

That the circumstances by which Petitioner had been placed in a position where he lacked power to resist interrogation were for the most part not the work of police or prosecutor does not in any way diminish the deprivation of Petitioner's Constitutional rights. This Court has long recognized that it is the nature, rather than the cause, of a defendant's impaired mental condition that determines whether a confession has been involuntary. See e.g., *Gallegos* v. *Colorado*, 370 U.S. 49, 52-55 (1962); *Reck* v. *Pate*, 367 U.S. 433, 440-43 (1961); *Culcombe* v. *Connecticut*, 367 U.S. 568, 620-27 (1961); *Fikes* v. *Alabama*, 352 U.S. 191, 197-98 (1957); *Haley* v. *Ohio*, 332 U.S. 596, 599-601 (1948); *Ziang Sung Wan* v. *United States*, 266 U.S. 1, 13-14 (1924). Moreover, in cases in which the defendant's physical and mental condition have made him less able to withstand interrogation, this Court has weighed heavily the lack of assistance to the accused from either friend

* The trial judge indicated that he regarded as inadmissible, or at least immaterial, evidence of lack of counsel under such circumstances (R. 46).

or counsel. *Gallegos* v. *Colorado, supra; Reck* v. *Pate, supra; Culcombe* v. *Connecticut, supra.* The Constitutional, and moral, basis for the exclusionary rule requires its operation regardless of whether the state creates the defendant's misery and degradation or callously takes advantage of it. In either case a grievous offense has been committed against human dignity.

III.

Petitioner Should Be Accorded a Hearing to Determine the Effect Drugs Had on His Capacity to Make a Voluntary Confession.

In Petitioner's application for a writ of certiorari it was asserted that in one respect the present case was identical with *Townsend* v. *Sain,* 372 U.S. 293 (1963), which was then pending before this Court. Petitioner believes that this Court's subsequent decision and opinion in *Townsend* establish conclusively that the courts below in the present case erred in refusing to grant Petitioner a hearing.

In its *Townsend* opinion, this Court described six situations in which a right to a hearing exists in a habeas corpus proceeding. 372 U.S. at 313. The present case fits squarely into one of these—that in which "material facts were not adequately developed at the state court hearing."

The particular issue on which a hearing is required concerns the effect two drugs—demerol and scopolamine—had on Petitioner's ability to resist or recall the interrogation that produced his confession. According to undisputed evidence in the record, Petitioner was given, immediately prior to his interrogation by the assistant district attorney, 50 milligrams of demerol and 1/150 of a grain of scopola-

mine* (R. 18, 118). The hospital physician who had attended Petitioner testified that demerol made one "dopey." He also testified that demerol normally required 15 minutes to be effective, but he admitted that this period might vary, although "not much," for a person in Petitioner's injured condition (R. 19, 119). The attending physician's estimate is in conflict with medical evidence, reported in a recent case, that the drug may be fully effective in 5 minutes. *Griffith* v. *Rhay*, 282 F. 2d 711, 714 (9th Cir. 1960). It also ignores the important question of how demerol is administered—a matter on which the state record in the present case sheds no light. If administered intravenously, the drug normally takes effect immediately. Hori and Gold, *Demerol in Surgery and Obstetrics*, 51 Canadian Medical Association J. 509, 511 (1944).

There is no doubt that, as was testified at the trial, demerol causes drowsiness and impairs alertness. It was not revealed at the trial, however, that scopolamine when administered in combination with demerol intensifies the normal effects of the latter. Rovenstine and Batterman, *The Utility of Demerol as a Substitute for Opiates in Preanesthetic Medication*, 4 Anesthesiology 126, 132 (1943); Osol, Farrar and Pratt, *op. cit. infra* at 1222. Nor was it revealed at the trial that while demerol alone has little amnestic effect, when it is administered in combination with scopolamine in the amount Petitioner received, the amnestic effect is pronounced. Total loss of

* The physician who had attended Petitioner read from the hospital record that Petitioner had received "50 mgm" of demerol and "1/150 gr." of scopolamine. He "guessed", erroneously, that "gr." meant gram; on the contrary, the size and use of the fractional amount indicates that the dose was measured in grains. Osol, Farrar and Pratt, 1 *The Dispensatory of the United States of America* 1223 (25th ed. 1955). An equivalent amount would be 0.4 mgm.

recall occurs in a large percentage of cases and partial loss in most of the remainder. Hori and Gold, *supra* at 512-13. The narcotic stupor produced by this drug combination blunts, but does not abolish, consciousness, "so that the patient can follow orders." Sollmann, *A Manual of Pharmacology and Its Application to Therapeutics and Toxicology*, 323-24, 254-55 (7th ed. 1948). These facts may well explain Petitioner's persistent inability in his trial testimony to recall any of the questions or answers made during his hospital interrogation by the assistant district attorney (R. 66, 107-11). In fact, his testimony indicates that, while he recalled being questioned by the police, he seemed to have no recollection at all of the subsequent interrogation.

No consideration was given at the trial to possible adverse effects of scopolamine. The only testimony relating to this drug was that of the attending physician who stated that it was used to "dry up the secretion of the throat and pharynges and the upper respiratory tract" (R. 17-18, 118). At no time was the trial court or jury given the crucially informative facts that scopolamine is a "cerebral sedative" and, very likely, a "cerebral depressant," Osol, Farrar and Pratt, *op. cit. supra* at 1222, and has the power to break down will and memory. *Townsend* v. *Sain*, 372 U.S. at 308; Sollmann, *op. cit. supra* at 323-24, 254-55; Hori and Gold, *supra* at 512. The absence of this information was particularly critical in view of the fact that the dose of scopolamine administered to Petitioner was almost twice as large as that which this Court held required a hearing in *Townsend* v. *Sain*, 372 U.S. at 302.

This failure of Petitioner's trial counsel to illuminate the effects of demerol and scopolamine cannot realistically

be regarded as Petitioner's fault. *Townsend* v. *Sain*, 372 U.S. at 302.

Given (1) the inconclusiveness and inadequacy of the evidence at the state trial concerning the effect of demerol on Petitioner and (2) the absence in the trial of any attempt to deal with the effect of scopolamine, it would seem that only through a hearing can Petitioner's Constitutional rights be safeguarded.

Conclusions

For the reasons stated the judgment of the court below should be reversed and the case remanded to the District Court with instructions to issue the writ and to order Petitioner's conviction to be set aside and that he be discharged from custody unless forthwith accorded a new trial; or, in the alternative, the judgment of the court below should be reversed and the case remanded to the District Court with instructions to accord Petitioner a hearing.

Respectfully submitted,

DANIEL G. COLLINS
New York University School of Law
Washington Square
New York 3, New York
Attorney for Petitioner

Dated: August 23, 1963

APPENDIX

U. S. Const., Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code, Title 28, Section 2243:

"A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 62

NATHAN JACKSON,

Petitioner,

—v.—

WILFRED DENNO, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

EDWARD S. SILVER
District Attorney, Kings County
Brooklyn, New York
Attorney for Respondent

WILLIAM I. SIEGEL
Assistant District Attorney
Of Counsel

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

TABLE OF CONTENTS

CASES CITED

Statutes Cited

Miscellaneous

Argued by
WILLIAM I. SIEGEL

IN THE

Supreme Court of the United States

October Term, 1963

No. 62

NATHAN JACKSON,

Petitioner,

—against—

WILFRED DENNO, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Statement

The writ of certiorari is addressed to the United States Court of Appeals for the Second Circuit in review of its decree affirming an order of the United States District Court, Southern District of New York. This order denied and dismissed a petition for the writ of habeas corpus sought by petitioner against respondent as Warden of Sing Sing Prison, New York. Petitioner is incarcerated in that institution pursuant to a judgment of the County

Court of Kings County convicting him of Murder in the First Degree for the killing of William J. Ramos Jr., a New York City police officer, and sentencing him to be executed.

Record History of the Case

The jury which convicted petitioner upon an indictment charging him with Murder in the First Degree of Ramos made no recommendation for mercy. New York's Court of Appeals affirmed the judgment on July 7, 1961 (10 NY 2d 780).

On October 5, 1961 that Court denied a motion for reargument (10 NY 2d 885), but did on the same day grant a motion to amend the remittitur and to certify that upon the argument of the appeal a constitutional question was necessarily presented and decided: to wit, whether petitioner's rights to due process under the Fourteenth Amendment were violated (1) by the use of a coerced and involuntary confession, and (2) by the deprivation of a fair trial through the failure and refusal of the trial Court to instruct the jury that in determining the voluntary nature of the confession they were to consider his physical condition at the time of its making. The Court of Appeals held that there had been no violation of any constitutional right (10 NY 2d 816).

On February 22, 1962, the Court of Appeals denied a further motion for reargument (11 NY 2d 798).

In the meanwhile and on December 18, 1961, this Court had denied a petition for the writ of certiorari (368 US 949).

There then followed the petition for the issuance of the writ of habeas corpus which was denied without a hearing by the United States District Court for the Southern District of New York (Dawson, D.J.) (206 Fed. Supp. 759). The petition was sought pursuant to the provisions of Title 28, United States Code, Sections 2241 *et seq.* The District Court, however, (Dawson, D.J.) did on June 14, 1962 grant a certificate of probable cause and leave to appeal *in forma pauperis* from the order of denial.

The District Court order of denial and dismissal was unanimously affirmed by the United States Court of Appeals for the Second Circuit on November 2, 1962 (Lombard, C.J. and Moore and Marshal, C.JJ.) (309 F 2d 573).

The present petition for the writ of certiorari was granted by this Court on January 21, 1963 (9 L. Ed. 2d 538).

Questions Presented

Petitioner contends

I. That the procedure employed by New York to determine the voluntariness of a confession—by leaving to the trial jury the ultimate factual determination of that question—violates the Fourteenth Amendment and therefore vitiates a judgment of conviction based either in whole or in part upon the confession.

It is our answer that this procedure, time-hallowed in New York's practice, is sanctioned by this Court and offends neither the Fourteenth Amendment nor any other constitutional provision.

II. That in the case at bar one of the confessions interposed in evidence against him was involuntary as a matter of law and that therefore its reception in evidence vitiates the judgment of conviction.

It is our answer that upon the evidence received at the trial the confession was completely voluntary. Therefore, no error was committed in its admission on the trial and its consideration by the jury.

III. That the District Court erred in denying and dismissing the petition for the writ of habeas corpus without a hearing *de novo* and that the Court of Appeals erred in sanctioning such practice.

It is our answer that the procedure followed by the District Court and the Court of Appeals was proper and that nothing decided by this Court in *Townsend* v. *Sain*, 372 US 293, required that a hearing *de novo* be held.

Record Facts Material to the Questions Presented

In the early morning hours of June 14, 1960 (55)*, petitioner, armed with a deadly firearm, entered a Brooklyn hotel admittedly for the purpose of commiting a robbery therein (66)**. When the crime was completed and as he emerged upon the street, he was met by Patrolman Ramos. A struggle ensued (69, 100) during which Ramos finally succeeded in pulling his gun from his holster (101), and

---

*, References herein are to pages of the transcript of record printed under the direction of the Clerk of the Court.

** He was accompanied by Nora Elliott, a co-defendant on the trial. She pleaded guilty to and was convicted of the crime of Manslaughter in the First Degree. Her participation in the crime raises no question material to the case at bar and no references will therefore be made to her.

shooting petitioner. Unfortunately, petitioner's simultaneous wounding of the police officer resulted in the death for which petitioner was indicted and convicted.

Petitioner then commandeered a taxicab in which he was driven to the Cumberland Hospital in Brooklyn for treatment and operation necessitated by abdominal wounds (113).

Detective John Kaile arrived at the hospital about 2:00 A.M. and petitioner, in response to a question as to his name, answered: "Nathan Jackson, I shot the colored cop. I got the drop on him" (35). Kaile testified that Jackson was not at that time in a weakened conditioned, but on the contrary was "strong" and answered questions without requesting a postponement (39).

The District Attorney was thereafter notified of petitioner's presence in the hospital and at about 3:55 A.M. his representative, Saul Postal, accompanied by stenographer Vito Lentini, arrived and took a record of Mr. Postal's examination of petitioner, in which the latter, although denying that he had gone to the hotel to commit a robbery (55), admitted the ultimate perpetration of the crime (56), the subsequent encounter with Officer Ramos and the wounding of the officer (57) either at the same time or after petitioner himself had been shot by Ramos. As petitioner graphically described the encounter: "I beat him to it." In this statement petitioner also recited the fact of his cab trip to the hospital (57).

We have noted the fact that the questioning by the District Attorney commenced "at about 3:55 A.M." At 5:00 o'clock in the morning an operation was begun upon petitioner which was completed at 8:00 A.M. (116). As a pre-

operative procedure, demerol and scopolamine were administered to him at 3:55 A.M. (118). While demerol has the effect upon a patient of making him "dopey", the effect is not immediate. Doctor George Suarez testified: "Well, it manifests its action about fifteen minutes after it is injected" (118). And this is a constant effect,—except in the case of children,—regardless of the physical condition of the patient (119) and even as respects a person who had been shot through the liver and who had lost 500 cc's of blood (120).

It is of course the concurrence in point of time of the administration of these drugs, demerol and scopolamine, with petitioner's questioning by the District Attorney which serves as the foundation of his argument that this statement,—a confession of premeditated murder, and so viewed by the jury,—was, because of petitioner's drug-induced mental condition at the time of its making, involuntary as a matter of law. We shall later in this brief elaborate upon the answer which we now make only in short: that the uncontradicted testimony given by Dr. George Suarez (113, 118-120) on this issue completely, and adversely to petitioner, disposes of the issue both factually and as a matter of law.

POINT I

The Fourteenth Amendment does not require that the Judge in a State criminal trial determine as a question of fact whether or not a confession is involuntary. It is in full accord with the due process clause of the Fourteenth Amendment that New York juries ultimately decide this question.

The manner in which appellant's brief presents this question requires us to re-state New York law on the subject.

New York's procedure for determining the voluntariness of a confession is provided by two sections of the Code of Criminal Procedure. Section 417 directs that:

> "The Court must decide questions of law which arise in the course of the trial."

Section 419 directs that:

> "On the trial of an indictment for any other crime than libel, questions of law are to be decided by the Court, saving the right of the defendant to except; questions of fact by the jury. And although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court."

For decades it has been law in New York that only where the evidence of coercion and compulsion is so clear that reasonable men cannot reasonably differ concerning the existence of these impermissible factors does the trial Court rule as a matter of law that the confession, being the product of coercion, is therefore constitutionally inadmissible upon the trial. Where there is a conflict of evidence concerning volun-

tariness, the solution of which requires an assessment of credibility of witnesses pro and con, the confession may be admitted into evidence and the question left to the jury with a direction to reject it if on the evidence they are satisfied that its making was not the voluntary act of the defendant. *People* v. *Cassidy*, 133 NY 62; *People* v. *Stielow*, 161 NY 599; *People* v. *Roach*, 215 NY 592; *People* v. *Trybus*, 219 NY 18; *People* v. *Doran*, 246 NY 409; *People* v. *Weiner*, 248 NY 118. In addition to the question of voluntariness, and also constituting a question of fact for the jury's solution, is that of the truth of a confession (*People* v. *Elmore*, 277 NY 397). It is within the province of the jury to assess the credibility of the witnesses whose testimony on these issues it considers. *People* v. *Brengard*, 265 NY 100; *People* v. *Seidenshner*, 210 NY 341; *People* v. *Eng Hing*, 212 NY 373; *People* v. *Seppi*, 221 NY 62. New York's trial Judges may not make themselves in any case into triers of the fact in a jury trial (*People* v. *Ohanian*, 245 NY 227), and it is error for a Judge even to intimate an opinion concerning the truthfulness of witnesses (*People* v. *Viscio*, 241 App. Div. 495).

This long standing rule has but recently been reaffirmed by the Court of Appeals in two cases.

In *People* v. *Lane*, 10 NY 2d 347, it is written:

> "We hold that no error was committed in submitting to the jury, under proper instructions, the voluntary nature of the confessions, although obtained after removal from the County jail and during a delay in arraignment (Roger v. Richmond, 365 US 534; Stein v. New York, 346 US 156, 187-188). Admissibility of confessions is a matter of State procedure (Roger v.

Richmond, supra, p. 543). Nothing in Mapp v. Ohio, 367 US 643, is to the contrary."

Froessel, J. in *People* v. *Rodriguez*, 11 NY 2d 279, 288 wrote:

> "The general rule, which has been repeatedly adhered to in the decisions of this court, is that the voluntariness of a confession is a question of fact for the jury. The facts that a defendant was illegally arrested (Balbo v. People, 80 NY 484), detained for an unlawful period of time prior to arraignment (People v. Vargas, 7 NY 2d 555), improperly removed from a county jail for further questioning (People v. Lane, 10 NY 2d 347), deceived into confessing (People v. Everett, 10 NY 2d 500), or allegedly coerced or beaten into confessing (People v. Bloeth, 9 NY 2d 211), have all been held to have been merely factors for submission to the jury for their consideration in passing upon the voluntariness of the confession."

Petitioner's central contention on this point is that the procedure thus sanctioned by New York's highest Court is violative of a defendant's constitutional right because its application may result in the reception in evidence against him of a confession which is in fact involuntary although the jury has found it to have been freely made. It is argued as a necessary corollary of this premise that only the trial Court should determine the question of voluntariness,—and this as a matter of law.

For this contention, petitioner cites no judicial authority. His reliance rests upon treatises and legal magazine articles: Meltzer, "Involuntary Confessions: The Alloca-

tion of Responsibility Between Judge and Jury, 21 U. Chi. L. Rev. 317 (1954); Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 104-05 (1956); 3 Wigmore, Evidence, Section 861 (3d ed. 1940); McCormick, Some Problems and Developments in the Admissibility of Confessions, 24 Texas L. Rev. 239, 251 (1946); Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv. L. Rev. 165-89 (1929).

It is we, submit, neither a reflection on the status of these authors, which we certainly do not intend, nor an inaccurate analysis of their position for us to say that their attitudes are all based upon an underlying and pervasive, and at the same time unjustified, disbelief in the efficacy of the jury system, in turn grounded upon their equally unjustified doubt of the ability of lay jurors to decide important questions of fact. This doubt is clearly expressed by Dean Morgan in his treatise "Some Problems of Proof • • •" (p. 104):

> "The case of a confession induced by physical or mental coercion deserves special mention. The protection which the orthodox rule or the Massachusetts doctrine affords the accused is of major value to him. A fair consideration of the evidence upon the preliminary question is essential; in this consideration the truth or untruth of the confession is immaterial. Due process of law requires that a coerced confession be excluded from consideration by the jury. It also requires that the issue of coercion be tried by an unprejudiced trier, *and regardless of the pious fiction indulged in by the courts, it is useless to contend that a juror who had heard the confession can be uninfluenced by his opinion of the truth or falsity of it.*

> Neither the due process clause of the Federal Constitution nor any other of its provisions requires any particular division of function between Judge and jury. The result is that in New York and a few other jurisdictions the orthodox rule has been abandoned in the one situation where it is most needed. The rule excluding the coerced confession is more than a rule excluding hearsay. Whatever may be said about the orthodox reasoning, that its exclusion is on the ground of its probable falsity, the fact is that the considerations which call for the exclusion of a coerced confession are those which call for the protection of every citizen, whether he be in fact guilty or not guilty. And the rule of exclusion ought not to be emasculated by admitting the evidence and giving to the jury an instruction which, as every Judge and lawyer knows, cannot be obeyed."

The assumptions inherent in this argument,—nay, not inherent but indeed expressed,—are (1) that a juror is necessarily and inevitably prejudiced by the mere hearing of a confession and prejudiced to the point where he cannot even consider the evidence pointing to its involuntary character no matter how strong that evidence may be; and (2) that jurors will not in this one instance of trial procedure feel bound by their oath of office which requires them to follow and obey the Court's instructions on the law.

It is our submission that if to jurors can be left the ultimate and awesome duty and power to decide the question of innocence or guilt, there can be constitutionally devolved upon them the power and duty to find the answers to all intermediate questions of fact, including even that of the voluntariness of a confession.

This Court has in *Leland* v. *Oregon*, 343 US 790, rehear. den. 344 US 848, thus expressed the same thought:

> "Juries have for centuries made the basic decision between guilt and innocence and between criminal responsibility and legal insanity upon the basis of the facts, as revealed by all the evidence, and the law, as explained by instructions detailing the legal distinctions, placement and weight of the burden of proof, the effect of presumptions, the meaning of intent, etc. We think to condemn the operation of this system here would be to condemn the system generally. We are not prepared to do so."

We add,—probably unnecessarily,—the additional statement: there is a logical inconsistency in the argument that a trial Judge's examination of the question of voluntariness is superior to an examination of the question made by a jury. The jury's consideration of the problem is in New York conducted under the guidance of the same rule of relevance as the Court would impose upon itself if it were the trier of this fact. There is no reason in experience to believe that the jury would not follow these rules. On the contrary, it is a presumption of law that the jury does obey and is guided by the Court's instructions (*People* v. *Lobell*, 298 NY 243, 254; *People* v. *Guardino*, 286 NY 132, 135).

And finally, possibility of error by the jury no more leaves a defendant without recourse than does the possibility of the same error by the trial Court. It is the function of an appellate court to cure error. That such appellate recourse is open to New York defendants needs no further proof than the record of this very case.

It is not a matter of surprise that petitioner cannot call to the aid of his argument of unconstitutionality the support of judicial authority in this or any other Court. On the contrary, this Court has sanctioned New York's procedure in *Stein* v. *New York*, 346 US 156. In *Stein*, p. 172, Jackson, J. wrote:

> "The procedure adopted by New York for excluding coerced confessions relies heavily on the jury. It requires a preliminary hearing as to admissibility, but does not permit the Judge to make a final determination that a confession is admissible. He may—indeed, must—exclude any confession if he is convinced that it was not freely made or that a verdict that it was so made would be against the weight of evidence. But, while he may thus cast the die against the prosecution, he cannot do so against the accused. If the voluntariness issue presents a fair question of fact, he must receive the confession and leave to the jury, under proper instructions, the ultimate determination of its voluntary character and also its truthfulness. People v. Weiner, 248 NY 118, 161 NE 441. The Judge is not required to exclude the jury while he hears the evidence as to voluntariness, People v. Brasch, 193 NY 46, 85 NE 809, and perhaps is not permitted to do so, People v. Randazzio, 194 NY 147, 159, 87 NE 112, 117."

In answer to the contention that the jury's general verdict of guilt leaves shrouded in doubt the entire question of their decision on the issue of voluntariness, Jackson, J. wrote (179):

> "The uncertainty, while the cause of concern and dissatisfaction in the literature of the profession, does not render the customary jury practice unconstitutional.

> The Fourteenth Amendment does not forbid jury trial of the issue. The states are free to allocate functions as between judge and jury as they see fit. (Citing). Many states emulate the New York practice while others hold that presence of the jury during preliminary hearing is not error. Despite the difficult problems raised by such jury trial, we will not strike down as unconstitutional procedures so long established and widely approved by state judiciaries, regardless of our personal opinion as to their wisdom."

Petitioner's brief (p. 7) says that:

> "The Stein aberration has been very severely criticized in the legal literature on the ground that it does not satisfy the Constitutional requirement of due process."

That "legal literature" (Professor Edmund Morgan *et als.;* this brief, p. 9), as we have seen, offers no more support for its argument than its basic, and basically unjustified, distrust of the jury system. The real *Stein* "aberration",—and the choice of epithet is petitioner's and not ours,—lay in that portion of the majority opinion of which Frankfurter, J. wrote in dissent (p. 201):

> "Unless I am mistaken about the reach of the Court's opinion, and I profoundly hope that I am, the Court now holds that a criminal conviction sustained by the highest court of a State, and more especially one involving a sentence of death, is not to be reversed for a new trial, even though there entered into the conviction a coerced confession which in and of itself disregards the prohibition of the Due Process Clause of the Fourteenth Amendment. The Court now holds that it is not enough for a defendant to establish in this Court that he was

> deprived of a protection which the Constitution of the United States affords him; he must also prove that if the evidence unconstitutionally admitted were excised there would not be enough left to authorize the jury to find guilt."

Or as Douglas, J. wrote (p. 204):

> "But now it is said that if prejudice is not shown, if there was enough evidence to convict regardless of the invasion of the citizen's constitutional right, the judgment of conviction must stand and the defendant sent to his death."

In so far as *Stein* was either intended by the majority, or understood by the minority, of this Court to have announced that doctrine, it is now clear that its departure from the current of constitutional law evolved by this Court from the time of *Brown* v. *Mississippi*, 297 US 278, on in 1936, does not represent current law. *Payne* v. *Arkansas*, 356 US 560, *Spano* v. *New York*, 360 US 315 and *Lynumm* v. *Illinois*, 372 US 528, have made it abundantly clear that the reception in evidence against a defendant of a coerced confession vitiates his conviction regardless of the plenitude of evidence of guilt *aliunde*.

Stein's approval of the New York jury procedure anent the problem of confession-voluntariness has had tacit approval in the Court's latest reference thereto in *Roger* v. *Richmond*, *supra*, where it is written (Headnote 9, p. 769):

> "Determination of the admissibility of confessions is, of course, a matter of local procedure."

Nor can it be argued that this Court did not have the question before it. It pointed to the fact (p. 771) that:

> "In Connecticut the jury plays no part in determining the voluntariness of a confession. Connecticut follows the orthodox rule of leaving the determination of admissibility exclusively to the trial judge."

It then wrote:

> "Compare Stein v. New York, 346 US 156, 97 L'ed 1522, 73 S Ct 1077. If a confession is admitted, the jury is left to weigh its truthfulness as it weighs other evidence."

We deem it proper to point out that since the adjudication of *Stein*, this Court has passed upon *Spano*, in which the procedure respecting the reception in evidence of confessions was identical with that now under review. True, the Court reversed the judgment of conviction upon the facts, holding that the confessions were in actuality the product of coercion. Nevertheless the Court did not question the constitutionality of the procedure for determination of the facts.

We may also allude to the fact that the New York procedure is identical with that followed in some of the Federal Circuits. *Patterson* v. *United States*, 183 F 2d 687; *United States* v. *Lustig*, 163 F 2d 85, where Hand, C.J. wrote for the First Circuit:

> "In the case of the ordinary confession, its trustworthiness is for the jury even if the Judge admits the confession."

Denny v. *U. S.*, 151 Fed. 2d 828 (4th C.C.A. 1945);
Alderman v. *U. S.*, 165 Fed. 2d 622 (D. C. App. 1947);
Tyler v. *U. S.*, 193 Fed. 2d 24 (D. C. App. 1951);

Duncan v. *U. S.*, 197 Fed. 2d 935 (5 C.A. 1952);
Smith v. *U. S.*, 268 Fed. 2d 416 (9 C.A. 1959).

Finally, we point to New York's own constitutional provision, Article 1, Section 2, which guarantees to a defendant in a capital case a trial by jury. Only constitutional considerations of the utmost weight, we submit, would justify holding that this State constitutional provision violated the Due Process Clause of the Fourteenth Amendment. *Stein* v. *New York, supra; Roger* v. *Richmond, supra; Leland* v. *Oregon, supra,* and reason and principle themselves establish that there is totally lacking any such constitutional necessity.

POINT II

Petitioner's confession was in fact and in law voluntary.

Absent from the case at bar are those factors of physical brutality and mental coercion which form the usual content of the cases which have passed in review before this Court. Appellant argues that the circumstances of the case: his wounded condition, in turn aggravated by the administration, in combination, of the drugs demerol and scopolamine nevertheless create an issue of voluntariness. It is an unnecessary argument, since we freely concede that if his physical condition was such as to have made mere questioning itself a form of mental compulsion the confession would in law be an involuntary one. Certainly we concede that if the drugs had bereft him of mental controls with the effect that his answers were not truly the product of a conscious mind, the same fatally infectious quality would inhere in

the confession. It is beyond argument that since this Court's decision in *Townsend* v. *Sain*, 9 L. Ed. 2d 770:

> "It is difficult to imagine a situation in which a confession would be less the product of a free intellect less voluntary, then when brought about by a drug having the effect of a 'truth serum'."

The key words in this Court's decision, however, were obviously "than when brought about by a drug."

The nub of the instant case on this point is the fact that in the record of the trial there is not one item of evidence which even suggests that either petitioner's wounded condition or the administration of demerol and scopolamine affected his ability to make a voluntary and reasoned confession.

The Court below accurately analysed the record in its disposition of the physical-condition-aspect of the case (30 seq.).

> "The facts surrounding the giving of appellant's statement are undisputed with one exception. The so-called statement or confession was given over a period of five minutes (3:55 AM-4:00 AM) and consisted of questions by an assistant district attorney and answers by appellant. No claim was made by appellant that any physical force was used or threatened or that the statement was the result of deception, ruse, false promises or guile. The questioning was not conducted in a police station with the potentially menacing presence of many police officers or conducted over an interminable period by a series of inquisitors. To the contrary the statement was given to a stenographer in a hospital room where appellant was in bed. The only dispute in testimony is found

> in appellant's claim that if he wanted some water ("They gave me some water once") he could not have it until he answered the questions 'the way they wanted me to answer them'. In contradiction, the stenographer, a nurse's aide and a practical nurse who were present, all testified that no such conditions were imposed. The testimony was that the refusal of more water was because of the mandatory requirement (fol. 43) of no food or water to any patient at such a pre-operative stage.
>
> With the entire state court record before us, the court is clearly convinced that there are no facts which tend to show that the appellant's statement was 'not freely self-determined'. The court is buttressed in this conviction by the fact that appellant took the stand and recited at length and with the greatest particularity the events of June 13 and 14th, 1960. Had any coercion, physical or psychological, been exerted, would he not have been the first to mention it? Yet the only intimation of any inducement to answer questions are the flatly contradicted 'more water' and the wanting to be 'left alone' claims."

When the Court below turned its scrutiny to the drug factor, its analysis was equally cogent (31):

> "The reliance which appellant places upon the injection of demerol as possibly causing a 'loss of willpower' is not well founded. His hypothesis is 'if the drug—had taken effect at the time he confessed—.' The undisputed proof was that any effect would not have commenced until at least ten minutes after the statement had been concluded. Although appellant had full opportunity to offer proof to the contrary if such existed, he did not do so. Griffith v. Rhay, 9 Cir., 1960, 282 F. 2d 711, although it discussed demerol which had been frequently administered to the defen-

> dant there for several days before he gave his statement, was decided upon the specific ground of the defendant's right to the assistance of counsel. The findings of the district court that oral admissions and the signed confession 'were the result of his free and voluntary act' were not the basis of the reversal."

We do not mean to suggest that this Court is bound by the fact-finding of the Court below, or of the New York Courts. We recognize the constitutional duty of this Court under the Fourteenth Amendment to make its own independent survey of the record and to reach its own independent conclusions concerning the voluntariness of the petitioner's confession. However, it is pertinent to quote Jackson, J. in *Stein, supra*:

> "Petitioners' argument here essentially is that the conclusions of the New York judges and jurors are mistaken and that by reweighing the same evidence we, as a super-jury, should find that the confessions were coerced. *This misapprehends our function and scope of review*, a misconception which may be shared by some state courts with the result that they feel a diminished sense of responsibility for protecting defendants in confession cases.
>
> Of course, this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding. *But that does not mean that we give no weight to the decision below, or approach the record de novo* or with the latitude of choice open to some state appellate courts, such as the New York Court of Appeals. Mr. Justice Brandeis, for this Court, long ago warned that the Fourteenth Amendment

> does not, in guaranteeing due process, assure immunity from judicial error. (citing). *It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if they do, that cause us to intervene to review, in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a state court.*
>
> It is common courtroom knowledge that extortion of confessions by 'third-degree' methods is charged falsely as well as denied falsely. The practical problem is to separate the true from the false. *Primarily, and in most cases final, responsibility for determining contested facts rests, and must rest, upon state trial and appellate courts.*
>
> A jury and the trial judge—knowing local conditions, close to the scene of events, hearing and observing the witnesses and parties—have the same undeniable advantages over any appellate tribunal in determining the charge of coercion of a confession as in determining the main charge of guilt of the crime. *When the issue has been fairly tried* and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great and, in the absence of impeachment by conceded facts, decisive respect." (Italics ours)

Frankfurter, J. succinctly expressed the same standard of assessment in *Fikes* v. *Alabama,* 352 US 191, 199:

> "A state court's judgment of conviction must not be set aside by this Court where the practices of the prosecution, including the police as one of its agencies, do not offend what may fairly be deemed the civilized standards of the Anglo American World."

In *Townsend, supra,* this Court wrote:

> "Numerous decisions of this Court have established the standards governing the admissibility of confessions into evidence. If an individual's 'will was overborne' or if his confession was not 'the product of a rational intellect and a free will,' his confession is inadmissible because coerced."

The principle is clear in statement. The difficulty which Courts have experienced with it has been in its application to differing states of fact. We could here, after parading the array of cases in which the Court has sustained State judgments of conviction based in whole or in part upon confessions (*Lisemba* v. *California,* 314 US 219; *Lyons* v. *Oklahoma,* 322 US 596; *Gallegos* v. *Nebraska,* 342 US 55; *Stroble* v. *California,* 343 US 181, re-hear. den. 343 US 951; *Stein* v. *New York, supra; Brown* v. *Allen,* 344 US 443; *Thomas* v. *Arizona,* 346 US 39; *Cicenia* v. *LaGay,* 357 US 504; *Ashdown* v. *Utah,* 357 US 426), analyze their facts and urge upon this Court that their similarity to the case at bar makes them relevant, cogent and determinative authority for the affirmance of the findings of the Court below and of the New York Courts. We realize, however, that each case is of necessity *sui generis;* and so realizing, we believe that it would be of no service to the Court to encumber this brief with detailed analysis. We therefore do no more than cite them in the belief that the Court's familiarity with them will bring to the Court's mind, not an identity of fact which can never exist, but a similarity of fact which is not unimportant in the consideration of the instant case.

Finally, we turn again to *Townsend* v. *Sain, supra,* and this Court's statement:

> "The Federal District Judges are more intimately familiar with State criminal justice, and with the trial of fact, than are we and to their sound discretion must be left in very large part the administration of Federal habeas corpus."

The case at bar is an excellent example of the proper employment by both District Court and the Court of Appeal of "their sound discretion" in "the administration of Federal habeas corpus."

Both Courts acted in admirable obedience to this Court's direction in *Brown* v. *Allen*, 344 US 443 that:

> "The decisive and serious responsibility of compelling State conformity to the Constitution by overturning State criminal convictions should not be exercised without clear evidence of violation."

POINT III

The District Court acted with legal propriety in denying the petition upon the basis of the record of trial in the State court.

Petitioner contends that the District Court erred in not holding a hearing and taking testimony thereon concerning his physical condition when he confessed to the District Attorney.*

---

* We advert to the fact that petitioner made two statements in the nature of confessions. The first was that made to Detective Kaile at 2:00 A.M. on June 14, 1960 and the other was the later one to the District Attorney beginning at about 3:55 A.M. For purposes of clarity, we express our certainty that the voluntariness and legal propriety of the earlier statement is not in issue here. Appellant's brief throughout, and particularly in its Point III, makes frequent references to the second confession and nowhere, except as a historical fact, does it refer to or argue about the first.

The issue presented to the District Court, identical with that raised at the State trial, was that of appellant's physical condition, caused by bullet wounds in his liver and lungs and of his mental condition as well. It was, as now, contended that he was in great pain and had suffered much loss of blood, had been deprived of water and had been subjected to a combined application of demerol and scopolamine (the former a preanesthetic narcotic)—all at a time, and with the effect of, rendering him incapable of making a truly voluntary confession.

The District Court considered itself authorized by this Court's opinion in *Brown* v. *Allen*, 334 US 443, to reach a decision on the petition by the employment of the State trial record and without an independent hearing *de novo*. The District Court wrote (3):

> "Where the record affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and such consideration is given to the entire state record, there is no necessity for having a hearing on the application for a writ of habeas corpus."

The Court of Appeals obviously approved this procedure and upon its review of the District Court's order, also "examined the entire State record" (30). There can be no doubt that prior to this Court's decision in *Townsend* v. *Sain, supra*, the procedure of the District Court and the Court of Appeal was authorized by *Brown* v. *Allen*. This Court wrote in *Brown* (463):

> "Applications to district courts on grounds determined adversely to the applicant by state courts should follow the same principle—a refusal of the

writ without more, if the court is satisfied, by the record, that the state process has given fair consideration to the issues and the offered evidence, and has resulted in a satisfactory conclusion. Where the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing is presented, a repetition of the trial is not required. See p. 488, supra. However, a trial may be had in the discretion of the federal court or judge hearing the new application. A way is left open to redress violations of the Constitution. See p. 483, supra. Moore v. Dempsey, 261 U.S. 86, 67 L ed 543, 43 S Ct 265. Although they have the power, it is not necessary for federal courts to hold hearings on the merits, facts or law a second time when satisfied that federal constitutional rights have been protected. It is necessary to exercise jurisdiction to the extent of determining by examination of the record whether or not a hearing would serve the ends of justice. Cf. 28 U.S.C. Sec. 2244. See note 15, supra. As the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of post-conviction remedies. See White v. Ragen, 324 US 760, 764, 89 L ed 1348, 1352, 65 S. Ct. 978."

The Court also furnished District Courts with an important guide to their evaluation of the State Courts' determination of fact (456).

"B. Effect of State Court Adjudications.—With the above statement of the position of the minority on the weight to be given our denial of certiorari, we turn to another question. The fact that no weight is to be given by the Federal District Court to our denial of certiorari should not be taken as an indication that similar treatment is to be accorded to the orders of the state courts. So far as weight to be given the proceedings in the courts of the state is concerned, a United States district court, with its familiarity with state practice is in a favorable position to recognize adequate state grounds in denials of relief by state courts without opinion. A fortiori, where the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed. Mooney v. Holohan, 294 U.S. 103, 97 L ed. 791, 55 S. Ct. 340, 98 A.L.R. 406; Ex parte Hawk, 321 U.S. 114, 88 L ed. 572, 64 S. Ct. 448. *Furthermore, where there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court may properly depend upon the state's resolution of the issue.* Malinski v. New York, 324 U.S. 401, 404, 89 L ed. 1029, 1032, 65 S. Ct. 781. In other circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not res judicata." (Italics ours)

But, argues petitioner, *Townsend, supra,* has in effect overruled *Brown, supra;* at least to the extent that on the facts of the case at bar, a District Court hearing was obligatory as a matter of law.

We disagree with this construction of the *Townsend* decision and confidently assert that what it did was to furnish

guidelines with respect to cases having no resemblance to the one at bar. The Court wrote (786):

> "We hold that a Federal Court must grant a evidentiary hearing to a habeas applicant under the following circumstances: if (1) the merits of the factual dispute were not resolved in the State hearing; (2) the State factual determination is not fairly supported by the record as a whole; (3) the fact finding procedure employed by a State Court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the State Court hearing; or (6) for any reason it appears that the State trier of fact did not afford the habeas applicant a full and fair fact hearing."

The facts of the instant case come within none of these classifications. Thus, the merits of the "factual dispute" concerning the voluntariness of petitioner's confession were "resolved" at the State trial by the ultimate finding of guilt. Again, the "State factual determination" is "fairly supported by the record as a whole". Petitioner's claim of physical and mental incapacity were passed upon by the jury in the framework of instructions to which the Federal Court of Appeals paid the tribute of speaking of its "clarity and accuracy" (28). Third, the State trial was certainly "adequate to afford a full and fair hearing" on the issue of voluntariness since New York's procedure offered to petitioner a preliminary voir dire concerning the admissibility of the confession. It is, as the Court of Appeals found, immaterial that here no voir dire examination was held. As the Court below held (31):

> "* * * the absence of such a hearing in this case is not error, since counsel for the defendant was asked explicitly whether he objected to use of the confession and he replied explicitly that he did not." *

It cannot be successfully argued that petitioner makes "a substantial allegation of newly discovered evidence". What he does in this Court, as he did in the Courts below, is only to suggest the existence of medical learning which was, however, in existence at the time of the State trial and which could have been availed of by the defense in the form of expert testimony. (We shall in a moment demonstrate both why defense counsel decided not to do so and his right as an experienced lawyer so to decide.)

Finally, it is our submission that it was not the "State trier of fact" (within the true meaning of the sixth *Townsend* classification) who "did not offer the habeas applicant a full and a fair fact hearing". Here, as well as with respect to the fifth classification, whatever omissions of fact-development may exist in the record do so exist because of a conscious choice of tactic by defense counsel,—a choice which cannot fairly be criticized.

The substance of petitioner's argument is that because "demerol causes drowsiness and impairs alertness" (his brief, p. 13),—and particularly so when demerol is administered in combination with scopolamine,—the confession contemporaneously made by him to the District Attorney should be held to be involuntary as a matter of law. In support of this contention, in both its medical and legal aspects, he cites in the first instance medical authorities

---

* We shall develop more fully the design of counsel's tactic at page 35, *seq.* of this brief.

and in the latter the cases of *Townsend* v. *Sain, supra,* and *Griffith* v. *Rhay,* 282 F. 2d 711, 714 (9th Cir.).

We have read his medical authorities: Rovenstine and Batterman, The Utility of Demerol as a Substitute for Opiates in Preanesthetic Medication, 4 Anesthesiology 126, 132 (1943); Hori and Gold, Demerol in Surgery and Obstetrics, 51 Canadian Medical Association J. 509, 511 (1944); Sollmann, A Manual of Pharmacology and Its Application to Therapeutics and Toxicology, 323-24, 254-55 (7th ed. 1948); 1 Osol, Farrar and Pratt, The Dispensatory of the United States of America 1222-23 (25th ed. 1955). We could content ourselves with the accurate statement that no one of these authorities contains even a suggestion that the narcotic effect of the drugs becomes operative within the five minute period during which the confession was made. We could also point to the fact that Goodman and Gilman in The Pharmacological Basis of Therapeutics, 2d Ed. 1960, 7th printing 1963, do not in their full discussions of the drugs assume to make a categorical statement of the time effectiveness of the drugs. We rather prefer, however, to answer that no generalized discussion, regardless of the eminence of its author, equals in weight and authority the record of the trial herein, of which the Court of Appeals wrote (31):

> "The undisputed proof was that any effect would not have commenced until at least ten minutes after the statement had been concluded."

Petitioner's argument must fail in the face of its characterization by the Court of Appeals (31):

> "His hypothesis is 'if the drug—had taken effect at the time he confessed—'."

Put in another form: the most attractive theory is of minimal importance when weighed against an established fact.

Townsend v. *Sain, supra* and *Griffith* v. *Rhay, supra,* offer petitioner no more support than do the medical citations. In *Townsend,* the confessing defendant, only nineteen years old, was a confirmed heroin addict, having used the drug since age fifteen. He had been given a combined dose of phenobarbital and scopolamine. The nine minute confession of the crime for which he had been convicted had been preceded by twenty-five minutes of questioning (whether concerning this case or on other matters does not appear). Townsend's expert,—a doctor of physiology, pharmacology and toxicology,—testifying in answer to a hypothetical question, assumed as an important aspect of the subject the fact that the person involved was a narcotic addict. Moreover, Townsend was in the opinion of a prosecution witness of "such a low intelligence that he was a mere mental defective and 'just a little above moron'." None of these factors can be attributed to petitioner.

Moreover, it should be remembered that there is in the case a standard of comparison which vouches for the voluntariness of petitioner's confession to the District Attorney. He had made a confessing statement two hours earlier to Detective Kaile, which in essence was similar to the District Attorney's confession. No preoperative narcotics had been administered to him. It is more than mere coincidence that the identity of subject matter exists. On the contrary: the practical identity in meaning and effect of the two confessions is plenary evidence that the later District Attorney's confession was made by a man who was in complete control of his mental faculties. In addition, the internal

evidence of the statement strongly suggests and indeed proves petitioner's clarity of mind. Its completeness and coherence show that it was the speech of a physically competent man.

We turn to *Griffith* v. *Rhay*. There the confession under scrutiny by the 9th Circuit Court of Appeals was made after demerol had already been administered to the confessing defendant sixteen times over a period of four days, and after he had already been operated upon four days before the ultimate questioning. The operation had left him in steady pain up to the very moment of interrogation. Moreover, it was itself so unsuccessful that four additional serious operations were required. It is our submission that the only similarity between *Griffith* and the case at bar is the incidental fact that in both the defendants had been given demerol. Surely, that is too tenuous a circumstance to lend substance to the argument that *Griffith* is authority for appellant's position in this case.

There also exists the basically additional important distinction in the cases. In *Griffith*, there was serious and material contradiction in the medical testimony concerning the effect of demerol even under the circumstances and in the quantity administered to that defendant. In the case at bar the medical testimony concerning petitioner's clarity of mind and freedom of will went uncontradicted.

Finally, as the Court below pointed out (this brief, p. 19), these frequent and major injections of demerol upon the defendant in *Griffith* were not the ground of decision by the reversing Court. The case "* * * was decided upon the specific ground of the defendant's right to the assistance of counsel."

Anent petitioner's general physical condition, the finding of capacity by the Court of Appeals (30-31) leaves no room for the hyperbolic claim (Pet. Br., pp. 10, 11) that his confession was taken by the District Attorney under "degrading and coercive" conditions and when he "lacked power to resist interrogation." We are, we submit, relieved of the necessity of further analysis by that judicial finding confirming the jury's verdict.

We come to what must therefore be petitioner's actual, although unexpressed, argument: that his trial counsel's affirmative decision—not to introduce medical testimony concerning scopolamine and demerol in contradiction to the People's evidence—constituted ineffective representation which entitles him to a re-trial of the confession-issue at a habeas corpus hearing.

We shall assume for the moment that petitioner's trial counsel erred in his judgment and was not without fault in his decision. Nevertheless, petitioner does not even on such basis establish either a case for present intervention by this Court or by the Courts below. All authority denies him such a right.

In *Diggs* v. *Welch, Superintendent D.C. Reformatory*, 148 F. 2d 667, cert. den. 325 U.S. 889, 65 S. Ct. 1576, 89 L. ed. 2002, petitioner based his petition for a writ of habeas corpus on the claim that his Court-appointed attorney "gave him such bad advice through negligence or ignorance in connection with entering his plea that he cannot be said to have been represented by effective or competent counsel". In affirming the order of the United States District Court for the District of Columbia dismissing the petition, the United States Court of Appeals for the District of Columbia wrote:

"There is no allegation that the Court did not select defendant's counsel with care and with due regard for appellant's constitutional right. We must assume that the Court appointed a reputable member of the bar in whom it had confidence. The issue presented on this record, therefore, is whether a prisoner may obtain a writ of habeas corpus on the sole ground that counsel properly appointed by the Court to defend him acted incompetently and negligently during the proceedings.

It is clear that once competent counsel is appointed his subsequent negligence does not deprive the accused of any right under the Sixth Amendment. All that amendment requires is that the accused shall have the assistance of counsel. It does not mean that the constitutional rights of the defendant are impaired by counsel's mistakes subsequent to a proper appointment.

The petitioner here must, therefore rely upon the due process clause of the Federal Constitution which guarantees him a fair trial. But to justify habeas corpus on that ground an extreme case must be disclosed. It must be shown that the proceedings were a farce and a mockery of justice. * * *

For these reasons we think absence of effective representation by counsel must be strictly construed. It must mean representation so lacking in competence that it becomes the duty of the court, or the prosecution to observe it and to correct it. *We do not believe that allegations even of serious mistakes on the part of an attorney are ground for habeas corpus standing alone.* The cases where the Supreme Court has granted habeas corpus on the ground that there was no fair trial support this interpretation of the absence of effective representa-

tion. They are all cases where the circumstances surrounding the trial shocked the conscience of the Court and made the proceedings a farce and a mockery of justice. Measured by the test of these cases the allegations in the petition before us are insufficient to require a hearing." (Italics ours)

Accord:

Cofield v. *United States*, 263 F. 2d 686;
United States v. *Wight*, 176 F. 2d 376, cert. den. 338 U.S. 950.

In *Cofield*, the Court summed up the legal question thus:

"Only if it can be said that what was or was not done by the attorney for his client made the proceedings a farce and a mockery of justice shocking to the conscience of the Court can a charge of inadequate legal representation prevail."

The rule is the same in New York (*People* v. *Tomaselli*, 7 N.Y. 2d, 350, *People* v. *Brown*, 7 N.Y. 2d 359; *People* v. *Girardi*, 2 App. Div. 2d 701). In *Brown, supra*, Fuld, *J.* wrote:

"It would be folly indeed for the courts to sit and hear disappointed prisoners try their former lawyers on charges of incompetent representation. Absent evidence that the trial Judge appointed an attorney who was unfit to defend the accused or that the Judge allowed counsel to continue to act after it appeared that his representation was such as to make the trial a farce and a mockery of justice, the fact, if it was one, that assigned counsel made an error of judgment or of tactics during the course of trial, is an insufficient ground for coram nobis and, this being so, it would be futile to have a hearing."

In *Girardi* the Court wrote:

> "We shall assume that appellant was entitled to reasonably competent counsel. He was not entitled to infallible counsel" (citing, inter alia, *United States* v. *Ragen*, 166 F. 2d 976).

Our assumption of fault, however, is but rhetorical. Actually, petitioner's counsel's choice of tactic was a wise and reasoned one, forced upon him by the plenary proof of petitioner's guilt. The People produced at the trial a number of eye-witnesses to the homicidal shooting. Their testimony proved beyond possibility of successful contradiction that petitioner fatally wounded Ramos in an attempt to escape from the scene of a robbery immediately after its perpetration: a fact indeed conceded by counsel in his summation (133). This would have supported a conviction under the felony murder theory (Penal Law, Section 1044(2)). In that petitioner stood over Ramos as he lay on the ground and then shot him, there was ample proof of premeditated murder which would have justified a verdict of common-law murder in the first degree (137). Counsel, realizing the hopelessness of an attempt to procure an acquittal, devoted almost his entire summation to a plea that the jury should convict petitioner, not of murder in the first degree, but of murder in the second degree or manslaughter. We choose but one example of his explicit plea (132):

> "And let me say at the outset, Mr. Foreman, that I do not ask you to acquit Jackson—I would be more than affectatious if I asked for an acquittal in this case. But I do say, and I am going to argue upon it on a proposition of law, that any guilt that is his is murder in the second degree, or manslaughter, and you will get the definition of both of those degrees

> of homicide, which will be charged to you in the case, and the definition of reasonable doubt."

This lawyer, Judge Healy, was no novice in the practice of the criminal law. He had spent upwards of a half a century in the trial and representation of persons accused of crime (27). His experience ran the whole gamut of such practice and had made him the Nestor of the Brooklyn Criminal Bar. Of him the District Court correctly wrote (7):

> "When evidence was introduced at his trial of the statements made by the defendant no objection to the introduction of such evidence was made by his attorney, who was an experienced trial lawyer and a former judge."

The Court of Appeal recognized the wisdom of Judge Healy's choice (27):

> "The summation of appellant's counsel clearly discloses his trial strategy both as to his unwillingness to object to the statement and as to his calling appellant to the stand. He must have been convinced as a result of his almost fifty years of experience that he would serve his client best if he did not 'ask you [the jury] to acquit Jackson' but to argue it 'on a proposition of law, that any guilt that is his is murder in the second degree, or manslaughter. . . .' "

The Court of Appeals for the Second Circuit has written on the subject in *United States ex rel. Reid* v. *Richmond*, 295 F. 2d 83 (reversed on other grounds sub nom. *Rogers* v. *Richmond*, 365 U.S. 534). A State defendant convicted of Murder in the First Degree sought the issuance of a Federal writ of habeas corpus because of the reception at the trial of a confession to which his competent assigned coun-

sel did not object and concerning which indeed the defendant himself testified (as did appellant in the case at bar). This Court, in reversing an order which sustained the writ, wrote:

> "Whatever may have been the reasons for the course taken by Reid and his counsel, it was a conscious reasoned choice made by counsel who was experienced in the ways of the criminal law. As such, it amounted to a forfeiture of any right to assert constitutional infirmities in the trial as a result of the admission of the statements (citing). The trial strategy had much to commend it; that it failed does not mean that it was mistaken. In any event, the failure does not entitle Reid to a second chance. Regrettable as hindsight may prove the choice to have been, Reid must be bound by what his lawyers did and his acquiescence in that course in his own testimony (citing cases)."

With but a change in the names of the parties, that which we have quoted above could well have been written in final disposition of the case at bar. It is our submission that the parallel is complete.

POINT IV

The Order of the Court of Appeals should be affirmed.

Dated: Brooklyn, New York
October, 1963

Respectfully submitted,

EDWARD S. SILVER
District Attorney, Kings County
Brooklyn, New York
Attorney for Respondent

WILLIAM I. SIEGEL
Assistant District Attorney
Of Counsel